HONG KONG STUDENT LAW REVIEW

Volume 1 1994

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Works in this publication should be cited as (1994) 1 HKSLR (page number)
e.g. Land Law Development in the People's Republic of China (1994) 1 HKSLR 74

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Foreword

It is no mean task to establish and maintain a law journal. There are potential contributors to persuade or cajole, disappointed authors to assuage, unenergetic subeditors to harass, tardy printers to threaten, uninterested distributors to plead with, potential subscribers to woo, and, above all, worthy readers to inform and entertain. Deadlines must be set and met, blue pencils wielded, citations checked, style-sheet injunctions enforced, copy marked up, proofs read, proofs re-read, sleep meanly rationed, family obligations neglected, proofs re-read again, and budgets somehow observed. Then, when all is done, and the first copies arrive from the printers, the infelicities and gaucheries and mistakes leap at you from the page.

Do the promoters of this new journal realise the extent of their foolhardiness and courage?

I warmly congratulate and applaud them. Interest in research and scholarship has seemed a rare commodity amongst law students, yet the ability to recognise a legal issue and analyse it competently in readable prose is essential to the practice of law. The raw material - the problems, the new laws, the unexplored established laws, the unconsidered practices, theoretical conundrums, historical developments - are everywhere in the legal system. The unprecedented challenges of China's resumption of sovereignty in 1997 are particularly in need of careful analysis, and these are matters which will intimately affect the personal and professional lives of law students. Any initiative which encourages reflection on such things, especially the kind of hard-headed reflection which commitment to publish and a deadline ensure, is to be welcomed. I don't envy the editors, but I wish them well.

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Preface

We hardly knew each other before the formation of the Editorial Board (the "Board") of the *Hong Kong Student Law Review* (the "*Review*"). The process began with a casual conversation between a member of our Editorial Board and Johannes Chan of the Faculty of Law that occurred last September. The member expressed his enthusiasm for promoting student research in our law school. Different options were canvassed. He decided to pursue the idea of a review which would be written by students on topics related to law. It was understood by both that the *Review* would involve a good deal of work. What had to be done immediately was to co-ordinate all interested students and explore the possibility of any form of financial support. Apart from a tentative plan which contained more problems than solutions, he walked away with a list on which the names of most members of the Board were written.

Almost everybody that he subsequently contacted indicated an interest in the *Review*. Only students were considered for membership of the Editorial Board, although several teachers, especially Peter Wesley-Smith, Johannes Chan and Shane Nossal, have contributed to the *Review* no less than the student-members have. Not surprisingly all of us were novices in publication. We could not ask for contribution of articles or money until we formed an association with well-defined objectives.

The *Review* is intended to be a forum for publishing students' academic writing. Each of us had a different view on what the forum could eventually do. Besides the promotion of legal scholarship and academia as a career, it was also considered that the *Review* would foster communication, exchange of ideas and learning experience of law or law-related issues among students within and outside the territory, paving the way for the establishment of a community of young commentators of law in Hong Kong. These would undoubtedly provide additional impetus for the reform of law. Many years ago, there was another student-run publication called "Justitia". We do not regard our initiative as a revival of "Justitia"; the *Review* is not limited to undergraduate dissertations, and the *Review* has several categories of writings.

The *Review* is divided into four sections. "Articles" are lengthy and serious writings which are original and perhaps creative. "Notes" are shorter. They are intended to generate debates on legal issues that are yet to be settled. "Everything you wanted to know about law but were afraid to ask" has its compass on campus. It is intended to let our fellow students share their learning experience in an open forum, especially their difficulties. Finally, "current issues" looks at current controversies and legal issues in Hong Kong. They are mostly short, news-oriented and analytical.

The Board seeks any article that has a respectable point to make on any legal issue. Naturally, it is beyond our ability to list exhaustively all the applicable criteria. Suffice it to say that we would welcome articles which are creative and well presented, even though they might generate criticism.

As soon as the objectives were clarified, we immediately had a reply to a probable criticism, about which some of us have been concerned, that the articles written by students were not of sufficient quality for publication. The Board was not ignorant of the general decline in language ability among students. Nevertheless, we considered that outstanding quality could only be achieved by continuous effort and experience of writing and editing. Besides, any consequential improvement on the part of authors or editors would have nothing but benefits to the law school (to which the student-authors belong) and the legal profession.

Therefore, our success would be measured primarily by the extent to which the enthusiasm of law students to write could be aroused by the *Review*.

After the initial meetings, we realized that securing adequate financial resources and articles were essential. Thanks to the generosity of a number of law teachers, we managed to proceed without having to pour in our own money. But the entire project requires much more. Different methods of fund-raising were considered. Through Professor Peter Wesley-Smith, who has established the needed channel for our subsequent solicitations, we approached both the Law Society of Hong Kong and the Hong Kong Bar Association. Both bodies were supportive of the *Review*. Moreover, some individual law firms and lawyers made financial contributions to the *Review*. It was our plan that the proceeds of sale of the first issue of the *Review* would be channelled to finance the expenses of the next one; so that any outside financing in the following years would be minimized.

By the time we made some progress it was already too late for some students to begin to write during their busy class schedules. We had to resort to course assignments which were recommended by law teachers for most of the supply of articles for the first issue of the *Review*. Our criteria of selection include, apart from the usual ones, articles on issues that are seldom explored and those about local legal issues. Teachers and students alike were generally willing to have the best assignments published. Together with the articles which were to be written shortly, we had enough submissions a couple of months before the deadline.

In the meantime we had to decide for ourselves the proper layout of the *Review*, inside and outside. Quotations from various printers were obtained as we tried to get the best bargain. In June, we finalized the design of the cover of the *Review*. To complete the remaining work, we had to check all the footnotes, edit the selected articles, complete the rest of the writing commitments and submit the articles to some faculty members for final proof or return them to the student-authors for revision if necessary.

Looking back over the past academic year, all members of the editorial board share the view that establishing the *Review* was a worthwhile pursuit, even though as full-time students we experienced a light strain on our timetable. As resolved in our previous meetings, any member of the Editorial Board must be a law student and the contributors must be students. Thus our involvement would come to an end on graduation. It is hoped that the publication will be continued, hopefully with the input from students of the City Polytechnic of Hong Kong, even though there would be different personnel on the editorial board or different reasons for supporting the *Review*; for the joy of writing can be an end in itself. Finally everybody who has supported the *Review* in one way or another should be pleased with the accomplishment thus far, noticing the dwindling zeal of students to engage in intellectual pursuits.

Editorial Board
August 1994

CONSUMER PROTECTION IN HONG KONG: IS THE PROPOSED LEGISLATION ENOUGH?

ASTER CAMILLE ELMS*

> Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly evident, that it would be absurd to attempt to prove it. But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer; and it seems to consider production, and not consumption, as the ultimate end and object of all industry and commerce.
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> 1776, Adam Smith, *Wealth of Nations*, p. 625 (Modern Library edition, 1937)

At last, Hong Kong is about to have more extensive consumer protection laws. While the golden age of consumer protectionism occurred during the 1970's and 1980's in most Western countries such as the United Kingdom, Australia, Canada and the United States, Hong Kong has "lagged far behind"[1] with her consumer protection development. Previously there was only a handful of legislative provisions which provided the public with some form of consumer protection.[2] In 1990 the Control of Exemption Clauses Ordinance[3] was enacted to cover more ground in the consumer protection arena. However, that Ordinance was not particularly enlightening as it mirrored all the inadequacies of the United Kingdom's Unfair Contract Terms Act 1977.[4] Fortunately, also in 1990, the Law Reform Commission of Hong Kong reported on the sale of goods and the supply of services and in its report urged that action be taken to improve the consumer protection situation in Hong Kong.[5] As a result three Bills were gazetted in late April this year.[6]

The first of the these, the Sale of Goods (Amendment) Bill 1994 aims to amend the present Sale of Goods Ordinance;[7] the second, Supply of Services (Implied Terms) Bill, aims to provide for implied terms in supply of services contracts; and the third, Unconscionable Contracts Bill, aims to adopt the Australian position with regard to unconscionable contracts. It is encouraging that the three Bills seem to extract most of the parts of the overseas consumer protection legislation which were recommended in the Commission Report, but at

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1 See 8.8 of the Law Reform Commission Report on Sale of Goods and Supply of Services (the "Commission Report"), [Topic 21], 1990.

2 Please see discussion below in section II.

3 Cap. 71, LHK.

4 For a critique of the Ordinance please see Aitken, "The Control of Exemption Clauses Ordinance" (1990) 22 HKLJ 381.

5 See the Commission Report, note 1 above, at 8.8.1.

6 They are: the Sale of Goods (Amendment) Bill 1994, the Supply of Services (Implied Terms) Bill, and the Unconscionable Contracts Bill gazetted on 22 April 1994, Legal Supplement No. 3 to the Hong Kong Government Gazette.

7 Cap. 26, LHK.

the same time it is disappointing that the "wider aspect"[8] of consumer protection was not included in these Bills. This article discusses the application and possible implications of the proposed pieces of legislation, and will then briefly outlines the other aspects of consumer protection which are still lacking in Hong Kong. Consumer redress and consumer education will follow, with alternative dispute resolution available in other jurisdictions as a central focus. Finally a brief summary of the PRC's recently promulgated consumer protection law will be given.

I. Application of the New Legislation

The new legislation consists of three separate Bills: the Sale of Goods (Amendment) Bill 1994, the Supply of Services (Implied Terms) Bill, and the Unconscionable Contracts Bill. These Bills are set out in full at the end of this article. They were the result of certain recommendations by the Law Reform Commission in its review of sale of goods and supply of services legislation.[9] Since the Commission did not have licence to deal with the topic of consumer protection *per se*,[10] it was apparent from the beginning that the whole task of promoting consumer protection could not be fully dealt with but the Commission did its best to accommodate consumer protection laws within the narrow framework of its terms of reference. As a result the Bills only cover those parts of consumer protection which are related to the sale of goods and the supply of services.

A. The Sale of Goods (Amendment) Bill 1994

1. General Amendments to Section 16 of the Ordinance

The Sale of Goods Ordinance[11] "codifies the law relating to the sale of goods".[12] It provides, *inter alia*, for the formation of the contract, conditions and warranties in the contract, the effect and the performance of the contract, and the remedies available to the seller and buyer. The main aim of this Bill is to clarify the law as to the supply of goods, namely, the Sale of Goods Ordinance. Section 16 of the Ordinance,[13] which provides for the seller's implied undertaking as to the quality or fitness of goods, is amended by the Bill so that it is no longer of a negative construction.[14] Section 2(5) of the Bill redefines the term

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8 As was recommended in the Commission Report. See note 1 above.

9 For a discussion as to the reasons of the recommendations and the extent to which they were adopted in the Bills, see the discussion below in section I.

10 The terms of reference of the Commission Report did not include the issue of consumer protection *per se* but the Commission had included a wide range of consumer-related issues in Chapter 8 of its Report. See the terms of reference of the Commission in 1.1 of the Commission Report.

11 Cap. 26, LHK.

12 See the beginning of the Ordinance, Cap. 26, LHK.

13 Section 16 is modelled in part on s 14 of the U.K.'s Sales of Goods Act 1979 (c. 54). Section 16(1) provides "Except as provided by this section, and section 17, and subject to the provisions of any other enactment, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale."

14 See 2.4.1 of the Commission Report. The new s 16(1) reads "This section provides for the circumstances in which, and the extent to which, there is any implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale." For a

"merchantable quality", bringing the legislation in tandem with developments in other jurisdictions.[15] The term "merchantable quality" is drafted to include additional aspects apart from that in the present s 2(5). Concepts such as the standard of appearance and finish of goods, goods being free from any defects (including minor ones), safety and durability of the goods are now extra considerations in deciding whether goods are of a "merchantable quality".[16] However the Bill does not propose any changes to the general scheme of the Sale of Goods Ordinance, in that there is no express provision aiming at consumer sales.[17] The implication of this is that the entire Ordinance applies equally to commercial sales as well as consumer sales ("consumer" is defined in s 2A of the Bill[18]) and the Bill does make one reference to the consumer in the new s 37(3) of the Bill, which is a deeming provision for the acceptance of goods. In addition, contrary to the recommendation of the Commission, the Bill does not seek to make reference to the definition of "merchantable quality" in the new s 16 of the Bill so that the section is more readily comprehensible to the layman.[19] There is a new provision added to s 16(1) to include sale by sample.[20] An extra subsection (8) is also added to s 16 to exclude other contracts of sale from the operation of ss 16 and 17 of the Ordinance.

2. "Merchantable Quality"

Since the scope of the term "merchantable quality" has been expanded in the proposed new s 2(5) the criteria of whether goods are of a "merchantable quality" will be briefly canvassed. Firstly, goods must be "fit for the purpose or purposes for which goods of that kind are commonly bought."[21] In *M/S Aswan Engineering Establishment Co. v. Lupdine Ltd*[22] the Court of Appeal in England concluded that the goods need not be fit for all purposes in a range of possible usage. Whether goods are fit for a particular purpose has to be judged by referring to other factors such as the price and any relevant circumstances,[23] which must also be borne in mind when looking at the other criteria for assessing merchantable quality. If the seller was unaware of any special circumstance peculiar to the buyer at the time of sale he is also not liable.[24] Secondly, goods must be of such standard and of appearance and

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comparison with the negative construction in the present s 16(1) of the Ordinance, see note 13 above.

15 See 2.1 of the Commission Report. Interestingly the definition of "merchantable quality" was modelled on s 2B of the proposed U.K.'s Consumer Guarantees Bill 1990 which did not become enacted into law.

16 Section 2(5)(b) to (e) of the Sale of Goods (Amendment) Bill 1994.

17 The Law Reform Commission has expressly pointed out that the Ordinance should apply to consumer sales so as to "better clarify frequent consumer queries about the quality of goods, rather than to refute the usefulness of the concept of merchantable quality". See 2.3.5 of the Commission Report.

18 This section that defines "consumer" is copied from s 4 of the Control of Exemption Clauses Ordinance.

19 See 2.5.4 of the Commission Report. The new s 16 of the Bill differs from the s 14(1) of the English Sales of Goods Act 1979.

20 Clause 4 of the Bill adds Paragraph (c) to s 16(2) of the Ordinance. "Sale by sample" is covered by s 17 of the same Ordinance.

21 Clause 2(5)(a) of the Bill. This phrase is now also being used in the same section of the Sale of Goods Ordinance as well in s 16(3) therein.

22 [1987] 1 WLR 1.

23 As provided in the present s 2(5) of the Sale of Goods Ordinance as well as in the amendment to s 2(5) proposed in the Bill.

24 See *Griffiths v. Peter Conway Ltd* [1939] 1 All ER 685 where the buyer was extra-sensitive to the material used in an overcoat that caused her dermatitis. The seller was not liable because he had no knowledge to the buyer's condition at the time of sale and the coat would not have caused any problems

finish[25] and must also be free from defects.[26] These are questions of fact for the court to consider in each individual case. There is also the requirement that the goods be safe.[27] This is more a matter for product liability and if a supplier of goods has failed to provide goods that are safe and which subsequently causes injury he will be liable in negligence.[28] The final criteria is that the goods must be durable.[29] This means that the goods must be of "reasonable durability" at the time of the sale.[30] Moreover, it is no defence that the seller of goods had taken all reasonable care to ensure that the goods were of merchantable quality. Liability in this respect is therefore strict.[31] But it should be noted that there are situations where the implied condition as to merchantable quality does not apply.[32] In sum, the legal effect of s 16 has not been changed by the amendment but it only restates for greater ease of reference the implied quality or fitness of goods.[33]

3. Other Amendments

There are also amendments to two other sections of the Ordinance. The first is the repealing of s 36[34] which deems that the buyer has not actually accepted the goods (thus losing the right to reject them) until he has had a reasonable opportunity to examine them. Repealing the section would mean that the effect of acceptance notes, which usually state that the buyer has examined the goods and that they were in good condition, are no longer valid.[35] Section 36(2) is, however, retained and in future the seller is bound to give the buyer a reasonable opportunity to examine the goods. But sellers may be able to escape this obligation by contracting out of the section.[36] The last amendment to the Ordinance is found in s 37.[37] This section provides three situations that deem the buyer to have accepted goods.[38] These situations are essentially covered by the amendment.[39] The amendment supplements s 36 in that the buyer is not deemed to have accepted the goods unless he has had a reasonable opportunity to examine them.[40] The exception to this is that the time-lapse must be reasonable before the buyer is deemed to have accepted the goods. However, in assessing whether this time-lapse was reasonable, one of the questions to be asked is whether the buyer

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to an ordinary person.

25 As provided in clause 2(5)(b) of the Bill.

26 As provided in clause 2(5)(c) of the Bill.

27 As provided in clause 2(5)(d) of the Bill.

28 Many Commonwealth jurisdictions already have legislation in force to deal with issues of product liability. For an outline of them see below at section IIB.

29 As provided in clause 2(5)(e) of the Bill.

30 *Lambert v. Lewis* [1982] AC 225, p. 276 (per Lord Diplock).

31 See *Henry Kendall and Sons v. William Lillico and Sons Ltd* [1969] 2 AC 31.

32 See s 16(2) of the Sale of Goods Ordinance and s 4(b)(ii) of the Bill which adds sales by sample to this excepted category if there defects would have been apparent on a reasonable examination of the sample.

33 See the *Explanatory Memorandum* to the Bill.

34 Cf. s 34 of the UK Sales of Goods Act 1979.

35 Indeed, this is the main reason why the Law Reform Commission recommended that the section be deleted. See 5.2(A) of the Commission Report.

36 The section provides that "[u]nless otherwise agreed...".

37 Cf. s 35(1) of the UK Sales of Goods Act 1979.

38 Namely, by express acceptance, an inconsistent act, or by the lapse of time.

39 See clause 6 of the Bill and s 37(1)(a), (b) and (4) of the amendments therein.

40 See clause 6(2) of the Bill.

has had reasonable opportunity to examine the goods.[41] As a result of the amendments, the buyer is given more protection *vis-a-vis* the seller. The other significant addition to s 37 is that the buyer will not be deemed to have accepted goods by the mere fact that he has disposed of the goods by way of a sub-sale or other disposition.[42]

4. Consumer Sales

"Consumer" is also an addition to the proposed amendment to s 37 and is protected by subsection (3). He cannot lose his right to a reasonable opportunity to examine the goods under the new subsection (2) by agreement or waiver. This is important, as presumably, the effect of contracting out of s 36(2) will only be limited to commercial sales.[43] The amendments in s 37 have attempted to clarify and strengthen the position of the buyer in his right to reject goods, but there are also other sections in the Ordinance which require a great deal of overhaul.[44] Again, the Commission's "jurisdiction" as to the review of the Ordinance has been limited by the terms of reference.[45]

B. The Supply of Services (Implied Terms) Bill

1. General Considerations

This Bill is copied directly from Part II of the UK Supply of Goods and Services Act 1982.[46] In the UK it was the result of a report by the National Consumer Council.[47] The phrase "contract for the supply of service" is very broad and the only qualification of it is that it means "a contract under which the supplier agrees to carry out a service".[48] It is clear that there must be a contract for the supply of services in existence before the legislation is applicable, excluding situations where there is privity of contract.[49] The "work" element of a contract for the supply of services is also included under the new law regardless of whether goods are involved by way of transfer, bailment, of hiring.[50] Therefore contracts for the servicing of a car or domestic appliances all fall within the umbrella of the Bill.[51]

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41 See clause (5) of the Bill which refers to subsection as to the purposes of examining the goods: firstly, to ascertain whether they are in conformity with the contract, and secondly, in cases of sale by sample, for a comparison between the bulk and the sample.

42 Clause 6 of the Bill and the new subsection (6) of the amendment to s 37 of the Ordinance therein.

43 See the above discussion on s 36 and note 36 above.

44 See 5.3.4 of the Commission Report as to the relationship between s 37 and other sections of the Ordinance.

45 See 1.1 of the Commission Report and its terms of reference contained therein.

46 C. 29. In particular, ss 12 to 15 thereof.

47 Entitled "Service Please" in 1981. As a result of this Part II of the Act was synthesized.

48 See clause 3(1) of the Bill and clause 3(2) which provides that contracts of service or apprenticeship are not contracts for the supply of service and clause 3(3) provides that the Governor-in-Council may exempt certain contracts from the operation of the Bill.

49 As in the cases of sub-contracting where the only form of action sounds in tort. See *Junior Books Ltd. v. Veitchi Co. Ltd.* [1982] 3 WLR 477.

50 And irrespective of the nature of the consideration. See clause 2(b) of the Bill.

51 See 6.2.4 of the Law Reform Commission Report.

2. The Implied Terms in a Contract for the Supply of Services

The Bill provides for a variety of implied terms for contracts for the supply of services. The first is the implied term as to the standard of care and skill whereby "the supplier will carry out the service with reasonable care and skill".[52] The wording of this phrase has been criticised as imposing a positive duty of performance on the supplier, and which also prohibits the delegation of performance to sub-contractors.[53] The standard of skill required of the supplier is a reasonable standard, which is an objective one.[54] The second implied term goes to the time of performance when there is no term in the contract specifying the time for its performance.[55] What is reasonable time is a question of fact.[56] Since the parties have not inserted into the contract a term as to the time of performance time is therefore not of the essence. The implied term as provided by the Bill will act as a term of "last resort". It follows that the implied term will not automatically render time of the essence, although failure to carry out the contract within a reasonable time may entitle a party to claim damages.[57] The final implied term relates to consideration and provides that a reasonable amount be charged where there are no provisions as to consideration in the contract for the supply of services.[58] As with the preceding implied term, this provision is residual, in that it will only operate where there is no term in the contract providing for consideration. Thus a party may not challenge the consideration in the contract where it is unreasonably high, or low.[59] Like the implied term as to time, this implied term may also require expert evidence as to the normal charge by similar contractors. There seems to be, however, a distinction between payment for work done and reward for results achieved which the Bill does not necessarily distinguish.[60]

3. Other Amendments

Clause 9(1)(a) of the Bill preserves any rule of law requiring a stricter duty on the supplier as to the provision of services. To differentiate between the cases in which the law will imply a warranty the Court of Appeal decision of Greaves & Co. (Contractors) Ltd. v. Baynham Meikle & Partners[61] is illustrative. Only in contracts such as those to build a house[62] where the house must be of sound quality will an implied warranty be inserted. Clause 9(1)(b) permits terms which are not inconsistent with the Bill to coexist in a contract for the supply of services. Clause 9(2) subjects the Bill to "any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description". This provision is of a technical nature to clarify the position of the Bill with other enactments, that

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52 See clause 5 of the Bill.

53 See Murdoch, "*Contracts for the Supply of Services under the 1982 Act*" [1983] LMCLQ 652.

54 See the *Bolam* test devised in the case of *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118.

55 See clause 6 of the Bill.

56 Clause 6(2) of the Bill.

57 See Murdoch, note 53 above, p. 659.

58 See Clause 7 of the Bill.

59 Murdoch, note 53 above, p. 660. This has also been rejected by the English Law Commission in 1986. despite representations by the UK National Consumer Council. See 6.5.2 of the Commission Report.

60 See Murdoch, note 53 above, p. 661, who advocates that there should be different considerations as to the charges for the two categories of services rendered.

61 [1975] All ER 99.

62 See for example the case of *Hancock v. B.W. Brazier (Anerley) Ltd.* [1966] All ER 901.

is, of course, if and when the Bill is enacted into legislation. Clause 8(1) of the Bill seeks to prohibit the exclusion of liability under the Bill by a party dealing with a consumer.[63] This clause is slightly different to the corresponding s 16(1) of the Supply of Goods and Services Act 1982 in that the consumer is not included in the Act.[64] Clauses 8(2) provides for the common law position with respect to the variations of rights and obligations under the contract for the supply of services, and sub-clause (3) provides that if an implied term under the Bill is inconsistent with an express term in the contract, the implied term may be negatived.

C. The Unconscionable Contracts Bill

1. Introduction

The concept of unconscionability has its roots in the English case of *Fry v. Lane*.[65] Since then, courts in the Commonwealth have been using this equitable concept to grant relief against a party which "is in a position to exploit a particular weakness of the other".[66] Although attempts have been made to expand this doctrine to cover situations where there is an "inequality of bargaining power"[67] the English position with regard to categories of unconscionability is now restricted by the House of Lord's decision in *National Westminster Bank v. Morgan*.[68] In this case Lord Scarman unequivocally opined that the doctrine of freedom to contract should not be restricted, and any restriction should be a matter for Parliament.[69] This is in line with the Privy Council's decision of *Pao On v. Lau Yiu Long*[70] in which the same learned Law Lord opined that uncertainty would be created if the inequality of bargaining power is used as an additional equitable ground for relief in contract apart from duress.[71] However, the doctrine of unconscionability is still applied in other Commonwealth jurisdictions, notably Australia, Canada, and the United States.[72]

The main reason why the Law Reform Commission decided to endorse the concept of unconscionability into Hong Kong law is because paragraph 3 of the Commission's terms of reference referred the Commission to report on the broad question of "whether it would be desirable to introduce any statutory control over unfair terms in contracts for the sale of

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63 "Consumer" is defined in clause 4 of the Bill and is identical to the definition in s 4 of the *Control of Exemption Clauses Ordinance*.

64 For an explanation of this and the implications of the result, see Murdoch, note 54 above, p. 661-2.

65 (1888) 40 Ch D 312. Relief was given in this case "where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice", p. 322.

66 Treitel, *The Law of Contract* (London, Sweet & Maxwell, 7th ed, 1990), p. 318.

67 Lord Denning in *Lloyd's Bank v. Bundy* [1974] 3 All ER 757, p. 763.

68 [1985] 1 All ER 821.

69 Ibid, p. 830. An example of legislation which provides protection against abuse from parties in a superior position is the 1977 Unfair Contract Terms Act in the UK and the 1990 Control of Exemption Clauses Ordinance (Cap. 71, LHK) in Hong Kong.

70 [1980] AC 614 on appeal from Hong Kong.

71 Ibid.

72 For a comparative analysis of the development of the doctrine, see Enman, "Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law" (1986) 15 AALR 191. A novel socio-economic approach to the application of the doctrine of unconscionability in consumer transactions in the U.S. can be found in Schwartz, "Unconscionability and Imperfect Information: A Research Agenda" (1991) 19 CBLJ 437.

goods or supply of services".[73] The Consumer Council has indicated that apart from exemption clauses there are other harsh and unconscionable terms in other consumer contracts. The extent of the problem is quite considerable. The most common of such types of contracts can be found in credit card agreements, motor insurance agreements, and agreements between tour operators and consumers.[74] As a result of this the Commission, after careful consideration of the relative pros and cons of the doctrine of unconscionability, concluded that justice should prevail over certainty in the circumstances,[75] and recommended legislation similar to s 52A of the Australian Trade Practices Act in Hong Kong.[76]

2. Clause 6(1) of the Bill and Section 52A of the Trade Practices Act Compared

The principal provision of the Unconscionable Contracts Bill is clause 6 which sets out the matters to be considered by the court in determining unconscionability. Before launching into a discussion of the section it is necessary to discuss the possible application of the Bill if it is enacted into law. As with the Supply of Services (Implied Terms) Bill, the Unconscionable Contracts Bill employs the definition of "consumer" in the Control of Exemption Clauses Ordinance.[77] In addition, contracts for services are also included in the definition of the consumer.[78] Clause 5(1) sets out the equitable relief that a court may at its discretion grant to the aggrieved party, and sub-clause (2) provides that the burden of proof of showing that a contract is unconscionable is on the party asserting it.[79]

Clause 6 of the Bill is directly borrowed from s 52A(2) and (4) of the Australian Trade Practices Act.[80] Section 52A(2) sets out a number of factors for the court to consider in deciding whether a contract or a part thereof is unconscionable. The list is not an exhaustive one and the court is perfectly entitled to take into account any other relevant considerations.[81] The terms of s 52A(2) have been described by one academic as "little more than a check-list"[82] in ensuring that the court will look at situations similar to the types set out in paragraphs (a) to (e) of the subsection. The legislative history of the section goes back to the review of the Australian Trade Practices Act in 1976.[83] As a consequence of the review the section was introduced in 1986 through the Trade Practices Revision Act. Prior to the enactment of the section there was already in place in New South Wales the Contracts Review Act 1980 which provides an excellent comparison for the operation of s 52A.[84]

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73 1.1 of the Commission Report.

74 Ibid, 7.6.

75 The Commission concluded that in the context of standard form contracts a party is often not adequately protected from the potentially harsh and unconscionable terms because regard is not given to the parties' relative strengths and positions. Ibid, 7.5.5.

76 Ibid, 7.7.5 and discussion below.

77 Section 4.

78 Clause 3(1)(c) of the Bill.

79 Cf. *Aylesford v. Morris* (1873) LR 8 Ch App 484.

80 1974 (Cth).

81 For example, in Australia, such relevant considerations may include sickness, illness and intellectual handicap. See J. Fullagar, in *Blomley v. Ryan* (1956) 99 CLR 362, p. 465.

82 By Professor Goldring in "Certainty in Contracts, Unconscionability and the *Trade Practices Act*: The Effect of Section 52A" (1988) 11 Syd L Rev 514, p. 525.

83 By the Trade Practices Review Committee, *Report*, Canberra, AGPS, 1976, para. 9.59 ff.

84 Goldring, note 82 above, p. 517 and Appendix A of the article has an excerpt of s 9(2) of the Contracts Review Act 1980.

Section 52A(2)(a) to (e), which are identical to clause 6(1)(a) to (e) of the Bill, is set out below. Clause 6(1) provides:

> (1) In determining whether a contract or part of a contract was unconscionable in the circumstances relating to the contract at the time it was made, the court may have regard to--
>
> (a) the relative strengths of the bargaining positions of the consumer and the other party;
>
> (b) whether as a result of conduct engaged in by the other party, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other party;
>
> (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
>
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the other party or a person acting on behalf of the other party in relation to the supply or possible supply of the goods or services; and
>
> (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the other party.

It is clear that paragraph (a) allows the court to look at the relative economic positions[85] of the parties. The case of *West v. A.G.C. (Advances) Ltd.*[86] is of assistance with regard to interpreting paragraph (b). This case was concerned with s 9(2)(d) of the Contracts Review Act 1980 (NSW) which is similar to paragraph (b). The major difference between that section and the present paragraph (b) is that it places emphasis on the contract between the parties but not the wider ambit of the entire transaction and the conduct of the parties. Thus although the court in the *West* case held that it was reasonably necessary for the company to protect its legitimate interest by way of a mortgage over the borrower's property,[87] there is a strong suggestion in the judgment that if the whole transaction and conduct of the parties were taken into account a different conclusion might have been reached.[88] Paragraph (c) would seem to be of particular importance in Hong Kong where contracts are almost always in English. This will mean that parties contracting with consumers will need to take special care in ensuring that the consumer understands the contract as well as any documents relating to it. Paragraph (d) is the "catch-all" provision that encapsulates the common law and penalises any

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85 See one of the earliest cases which applied this imbalance in the parties' economic position as a criterion for establishing unconscionability: *Evans v. Llewellin* (1787) 1 Cox C C 333. The case concerned a poor heir who sold his inheritance at a gross undervalue. See Treitel, note 66 above, p. 319.

86 (1986) ASC 55.

87 The company had made a loan to the wife of an employee of a business which benefitted from the loan. The question for the court was whether security over the wife's property was reasonably necessary to protect the legitimate interest of the finance company.

88 In particular see McHugh, J.A. in (1986) ASC 55, pp. 56 & 714. See also Goldring, note 82 above, pp. 526-7.

undue influence,[89] pressure,[90] and unfair tactics[91] forced upon the consumer or its agent by the other party or its agent. Paragraph (e) calls for an examination of the parties' relative bargaining powers in the market, and may involve the taking of expert advice.

3. The Relevant Time and Circumstances for Determining Unconscionability

Clause 6(2) of the Bill is also similar to s 52A(4) of the Australian Act. This section provides for the relevant circumstances and time for determining whether a contract is unconscionable. The court has discretion to look at conduct or circumstances existing before the commencement of the Ordinance,[92] and is also given a wide measure of discretion in assessing whether circumstances from which any unconscionability arose are "reasonably foreseeable" (that is, an objective test) at the time of contract.[93] This means that the court may actually have regard to the previous conduct of the parties[94] as well as to any unconscionability arising from circumstances which are foreseeable to a reasonable person. All this means is that the court can apply the guidance set out in s 6(1) of the Bill to these two different time-frames. The implication is that anyone dealing with consumers must take extra care because previous dealings may also be subject to the court's scrutiny. While discussing parties dealing with consumers it is noteworthy that the Bill has power to cover a wide spectrum of potential defendants.[95] If clause 6 is read in conjunction with clause 3 and the definition of "business" in clause 2(1) of the Bill the result will be that any party which contracts in the course of a business[96] with the consumer will be potentially liable.

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89 As was in the case of *Lloyd's Bank Ltd. v. Bundy* [1975] 1 QB 326, and *Commercial Bank of Australia v. Amadio* (1983) 151 CLR 447. For a recent House of Lords decision which clarifies the position with regard to undue influence, particularly the relationship between a husband and wife, see *Barclays Bank Plc. v. O'Brien* [1993] 3 WLR 786 and Lehane, "Undue Influence, Misrepresentation and Third Parties" (1994) 110 LQR 167. The concept of undue influence is narrower than the concept of unconscionability, concerned with "the exercise by the contracting party of an independent and voluntary will". See Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 LQR 238.

90 Unfortunately there is a dearth of helpful case law in this area in Australia. However, the concept of pressure is a wide one and can be likened to the concept of duress which requires there to have been "a coercion of the will which vitiates consent". (*Pao On v. Lau Yiu Long* [1980] AC 614, p. 636) It will be interesting to see how the court interprets "pressure" and whether concepts such as "economic duress" will be treated as "pressure". For a discussion of these concepts, see Treitel, note 66 above, pp. 312-4.

91 This phrase has been described as wider than "harsh", "oppressive" or "unconscionable". See Goldring, note 82 above, p. 528.

92 Clause 6(2)(b) of the Bill.

93 Clause 6(2)(a) of the Bill.

94 For example in the case of *Paciullo v. W.W. Vallack Real Estate Pty. Ltd.* (1986) ASC 55 (a case concerned with s 10 of the Contracts Review Act 1980 which is similar to clause 6(2) of the Bill) evidence was called as to the frequency of usage of an allegedly unjust condition in an agreement. See Goldring, note 82 above, p. 529.

95 The Australian Trade Practices Act 1974 (Cth) only applies to corporations as defined in s 4(1) of the same Act.

96 "In the course of a business" has been defined in the House of Lords decision in *Davies v. Sumner* [1984] 1 WLR 1301 which concerns s 1(1) of the Trade Descriptions Act 1968. The phrase requires that the transaction must have been carried out with some degree of regularity. This was followed in the English Court of Appeal case of *R & B Brokers Ltd v. U.D.T. Ltd* [1988] 1 WLR 321.

The definition of business is left deliberately vague[97] so that there is leeway for the court to include other definitions.[98]

4. Conclusion

The above discussion has attempted to provide a brief introduction to the Unconscionable Contracts Bill. Assuming that the Bill will eventually become law in Hong Kong, it is envisaged that the court will have to resort to the relevant Australian case law and legislative history of s 52A(2) and (4) of the Trade Practices Act. It will be interesting to see how receptive the court will be to such an approach, given that the development of the doctrine of unconscionability has gone in somewhat opposite directions in both England and Australia,[99] and that the courts in England at least seem reluctant to endorse a wider application of the concept of unconscionability into the law.[100] Nonetheless, to use the words of the Law Reform Commission, the new legislation on unconscionability will "have a restraining effect on large organisations in that their lawyers would be more even-handed when drafting their contracts because the court could strike down what terms it considered to be harsh and unconscionable".[101]

II. Other Areas of Consumer Protection

Due to the voluminous amount of literature written on the subject of consumer protection, it will be impossible and superficial to attempt to discuss the entire area of consumer protection. Instead of sacrificing detail for brevity, only one specific area of consumer protection will be discussed in detail. This is the area of product liability, in which there has been legislative action in Hong Kong recently.[102] The section will briefly describe the legislative protections afforded to the consumer in the United Kingdom in the area of product liability. It is, of course, important to remember that such legislation also exists in other jurisdictions.[103] It is also important that the reader appreciate the other areas of consumer protection which are

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97 "Business" is defined in clause 2(1) of the Bill as "includes-(a) a profession; (b) the activities of a public body or public authority; and (c) the activities of a board, commission or committee or other body appointed by the Governor or Government."

98 Such as that found in s 2(1) the Business Registration Ordinance (Cap. 310, LHK): "any form of trade, commerce, craftsmanship, profession, calling or other activity carried on for the purpose of gain and also means a club".

99 See generally, Enman, note 72 above.

100 See Borrie, "*Trading Malpractices and Legislative Policy*" (1991) 107 LQR 559 for a persuasive argument by the Director General of Fair Trading calling for the British adoption of s 52A of the Australian Trade Practices Act 1974 (Cth).

101 See para. 7.7.3 of the Commission Report.

102 In the form of the Toys and Children's Products Safety Ordinance, Cap. 424, LHK.

103 See for example, section 402A of the Restatement (Second) of Torts (1965) of the United States; The Consumer Products Warranties Act 1977 of Saskatchewan; Consumer Product Warranty and Liability Act 1978 of New Brunswick; and Part V, Division 2A of the Trade Practices Act 1974 (Cth) of Australia.

of grave concern in Hong Kong, such as consumer credit and consumer information.[104] In order to provide a full picture, one must first look at the existing consumer protection legislation in Hong Kong.[105] It is important that the reader bear in mind the discussion above concerning the three pieces of proposed legislation which will soon operate to add to the legislative scheme of protection.

A. The Present Scheme of Consumer Protection Legislation in Force in Hong Kong

There are about ten Ordinances in Hong Kong which provide protection to the consumer, two of which have already been mentioned above.[106] The remaining Ordinances deal with two principal areas of consumer protection: the first being consumer information, the second concerning public health and safety.[107]

1. Consumer Information

The major legislative provision on consumer information can be found in the Trade Descriptions Ordinance.[108] This Ordinance is partly modelled on the 1968 UK Trade Descriptions Act.[109] The Ordinance governs the general description of goods but it does not deal with description of services.[110] The Governor-in-Council may order goods or advertisements to be accompanied by information or instructions.[111] In addition, the Ordinance makes false descriptions of goods in the course of business or advertisements an offence,[112] with the maximum penalty of $500,000 and imprisonment of 5 years if on conviction on indictment.[113] That the Ordinance provides for the criminal sanctions of false trade description shows at least the recognition of the legislature that such conduct cannot be tolerated. Despite this, not only does the Ordinance not provide for civil remedies for the aggrieved party, but also it leaves a significant gap with regard to the other aspects of trade description, for example advertisements of prices and services

The other legislation which deals with consumer information is the Weights and Measures Ordinance.[114] As the name suggests, the Ordinance makes the use of fraudulent methods and equipment for weighing an offence. The Food and Drugs (Composition and

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104 See Chapter 8 of the Commission Report on Sale of Goods and Supply of Services for a more comprehensive criticism of the extent of the lack of consumer protection mechanisms in Hong Kong. Other deficient areas include consumer information and consumer sales legislation.

105 For a complete list of all these Ordinances, see the introduction to Chapter 8 of the Law Reform Commission Report.

106 The Sale of Goods Ordinance and the Control of Exemption Clauses Ordinance.

107 For a discussion with respect to the consumer protection legislation in the areas of product liability and consumer credit see section B below.

108 Cap. 362, LHK.

109 C. 29.

110 Cf. ss 13 and 14 of the U.K. Trade Descriptions Act 1968 which include into the ambit of application of the Act services as well as goods.

111 Sections 4 and 5 of the Ordinance.

112 Sections 4, 5, 7, 9, 10, 11 or 12 of the Ordinance.

113 Section 18 of the Ordinance.

114 Cap. 51, LHK.

Labelling) Regulations[115] provide for the labelling of prepackaged food[116] and sets out requirements of standards of compositions, markings and labelling for a number of food, drugs, and milk and milk products.[117] The Undesirable Medical Advertisements Ordinance[118] prohibits dishonest advertisement for medicines to cure contagious diseases.[119] The Money Changers (Disclosure of Rates, Charges and Commissions) Ordinance[120] governs moneychangers but not banks and deposit-taking companies in the information to be furnished to customers. The rate of exchange and commission charged must be made known to the customer prior to the transaction and the customer must consent before the transaction can be carried out.[121] Finally, the Money Lenders Ordinance[122] requires moneylenders not exempted from the First Schedule of the Ordinance[123] to provide the borrower with information as to the money-lending transaction,[124] and makes it an offence for the charging of excessive interest rates.[125]

2. Public Health and Safety

As regards legislation affecting public health and safety the primary piece of legislation is the Public Health and Municipal Services Ordinance.[126] There are altogether 86 pieces of subsidiary legislation pursuant to this Ordinance, and about a fifth of these are directly or indirectly related to the consumer. They include: the Colouring Matter in Food Regulations,[127] the Dried Milk Regulations,[128] the Food Adulteration (Artificial Sweeteners) Regulations,[129] the Food Adulteration (Metallic Contamination) Regulations,[130] the Frozen Confections By-laws,[131] the Harmful Substances in Food Regulations,[132] the Imported Game, Meat and Poultry Regulations,[133] the Milk By-laws,[134] the Mineral Oil in Food Regulations[135] and the Preservatives in Food

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115 Subsidiary legislation pursuant to s 55 of Public Health and Municipal Services Ordinance, Cap. 132 sub. leg. W., LHK.

116 Section 4 of the Regulations.

117 Sections 3 and 4 of the Regulations.

118 Cap. 231, LHK.

119 Section 3 of the Ordinance.

120 Cap. 34, LHK.

121 Section 4 of the Ordinance.

122 Cap. 163, LHK.

123 See the definition of a "moneylender" in s 2 of the Ordinance.

124 Section 19 of the Ordinance.

125 Section 24 of the Ordinance.

126 Cap. 132, LHK.

127 Cap. 132 sub. leg. H.

128 Cap. 132 sub. leg. R.

129 Cap. 132 sub. leg. U.

130 Cap. 132 sub. leg. V.

131 Both the Regional Council By-laws (Cap. 132 sub. leg. AB) and the Urban Council By-laws (Cap. 132 sub. leg. AC).

132 Cap. 132 sub. leg. AF.

133 Cap. 132 sub. leg. AK.

134 Both the Regional Council By-laws (Cap. 132 sub. leg. AP) and the Urban Council By-laws (Cap. 132 sub. leg. AQ).

135 Cap. 132 sub. leg. AR.

Regulations.[136] As to the control of the sale and dispensing of dangerous drugs, poisons and antibiotics to consumers there is the Pharmacy and Poisons Ordinance.[137] However, the Ordinance does not govern the sale of Chinese herbal medicine.[138]

B. An Area that has seen a "Partial Eclipse" in Hong Kong[139]: Product Liability

1. Introduction

The area of product liability is vast. As one commentator pointed out recently, there have been as many as 1000 cases generated since 1988.[140] The concept of manufacturers being liable for defective products dates back to the leading House of Lords decision in 1932 of *Donoghue v. Stevenson*[141] in which the manufacturer of soft drinks was considered capable of being held liable on the *prima facie* proof of his negligence. However the crucial distinction between products liability legislation and the common law is that the former does not require the proof of negligence by the plaintiff which is required by the latter. Therefore, in Hong Kong, in the absence of similar product liability legislation, the consumer will still have to prove the manufacturer's negligence.[142] But although overseas product liability legislation endorses the notion that the manufacturer is strictly liable, there are defences available to them which are the cause of much controversy.[143] The major impact and implication of product liability legislation is that the manufacturer is liable to third parties without the latter's needs to prove negligence. This greatly improves the plight of those consumers who, if they had been in Hong Kong today, would only have an action that sounds in the common law of tort, and would have to go through the process of proving negligence in the usual way. The Sale of Goods Ordinance is not of assistance to the third party either as the implied terms as to quality and fitness only apply to the buyer and the seller. Thus the doctrine of privity will bar any action by a third party relying on the Ordinance.[144]

2. Part I of the U.K. Consumer Protection Act 1987

The background to the United Kingdom's product liability legislation, that is, Part I of the Consumer Protection Act 1987,[145] can be traced back to developments in the United States, especially after the disastrous effects of the drug thalidomide.[146] The English Law Commission eventually reported on the subject in 1977[147] and in 1985 the EEC issued a

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136 Cap. 132 sub. leg. BD.

137 Cap. 138, LHK.

138 Section 38 of the Ordinance.

139 See discussion on the implementation of products liability legislation in Hong Kong below.

140 Jill Cottrell, "Product Liability", in Shane Nossal (ed), *Law Lectures for Practitioners 1993*, p (Hong Kong: Hong Kong Law Journal Ltd.), 70.

141 [1932] AC 562.

142 Of which the standard of proof is on the "balance of probabilities" as it is a civil matter.

143 See, for example, Newdick, "The Development Risk Defence of the Consumer Protection Act 1987" [1988] CLJ 455.

144 For a House of Lords endorsement of the doctrine of privity see the case of *Beswick v. Beswick* [1968] AC 58, pp. 72, 81, 83, 92-93, 95.

145 C. 43.

146 See Benjamin's, *Sales of Goods* (London, Sweet & Maxwell, 4th ed, 1992), section 14-031.

147 Entitled "Liability for Defective Products" (Law Com No. 82, Cmnd 6831, 1977).

Directive on Product Liability in order to bring in line the law of all member states.[148] As a result; Part I of the Act expressly states that the purpose of the Act is to comply with this Directive.[149] The essential difference between the Act and the common law is that instead of imposing liability mainly according to the conduct of the manufacturer, the Act takes a very strict view of the defects of the product itself regardless of the conduct of the manufacturer.[150] The Act is in two Parts: the first deals with product liability, the second deals with the safety of goods and consolidates similar legislation such as the Consumer Protection Act 1961, the Consumer Safety Act 1968 and the Consumer Safety (Amendment) Act 1986. The innovative approach adopted by Part II with respect to consumer safety is the inclusion of the recommendation in a government White Paper.[151] As a result of this, s 10 of the Act imposes criminal liability on any person who, *inter alia*, supplies consumer goods which fail to comply with the general safety requirement.[152] Part III of the Act, which covers misleading price indication and replaces s 11 of the Trade Descriptions Act 1968 and the Price Marking (Bargain Offers) Order 1979. Part IV of the Act provides for the enforcement mechanisms to Parts II and III.

The definition of "producer" is found in s 1(2) of the Act and is separated into three categories: those who manufacture goods, those who abstract the raw material for the product; or, those who are involved in neither of the above but are involved in a process which is an essential step in the production of the product.[153] "Product" includes electricity, component parts, raw materials and products that form a part of another.[154] The next issue is the determination of the term "defect" in the Act. The test to be applied is the "consumer expectation test",[155] a concept that generated from the United States. This test requires that the product must not be in a "defective condition unreasonably dangerous".[156] This has caused a lot of controversy in both the United States and the United Kingdom, particularly pertaining to the inability of setting an objective standard against which the safety of the product can be measured. In short, the argument advanced is that the test cannot provide an

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148 Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (No.85/374/EEC).

149 Section 1(1) of the Act.

150 See Clark, "The Consumer Protection Act 1987" (1987) 50 MLR 614, p. 614.

151 Entitled "*The Safety of Goods*" Cmnd. 9302. The paper was presented to Parliament by the Secretary of State for Trade and Industry in July 1984. Paragraph 34 of the White Paper proposed "a general obligation on the suppliers of consumer goods to achieve an acceptable standard of safety when it is reasonable to expect them to anticipate and to reduce the risks arising from those goods". See Harvey, "Product Liability and Safety of Goods" (1987) 131 SJ 1053.

152 A person may also be liable if he "offers or agrees to supply" (s 10(1)(b)), or "exposes or possesses any such goods for supply" (s 10(1)(c)).

153 For a good discussion of these categories and what they may include see Tiplady, "Consumer Protection: The Cure Worse than the Disease?: 1" (1988) 132 SJ 430. See also the criticisms as to the broad application of the definition of the producer and the implications to insurance see Clark, note 150 above, p. 616.

154 Section 1(2) and (3) of the Act.

155 Section 3(1) of the Act provides, inter alia, that "there is a defect in a product for the purposes of this Part if the safety of the product is not such as persons generally are entitled to expect".

156 Section 402A of the Restatement (Second) of Torts of the United States. See also Clark, note 150 above, pp. 617-8.

accurate standard for the expectation of the consumer in all cases.[157] The consumer may recover for damage to either person or property (which includes land).[158] Apart from the difficulty in showing that a product is defective, there is also a list of defences available to the suppliers.[159] The most controversial of this is what is known as the "development risk" defence in s 4(1)(e). The essence of this defence is that given the state of scientific and technical knowledge at the relevant time, the producer of products of the same description as that in question would not be reasonably expected to discover the defect if it had existed in products in his control.[160] The limitation period is 10 years from the relevant time[161] the product was supplied.[162] Otherwise the normal rules as to the limitation of actions apply.[163]

3. Part II of the U.K. Consumer Protection 1987

Having very briefly discussed Part I of the Consumer Protection Act 1987, the discussion will now revolve around Part II of the Act which is concerned with product safety. While liability in Part I of the Act is civil, Part II imposes criminal sanctions for unsafe goods. Part II applies to "consumer goods".[164] This is defined in s 10(7) and means "any goods which are ordinarily intended for private use or consumption". A list of exempted goods is also given in the same section.[165] By virtue of s 11, the Secretary of State can make safety regulations to control goods and to ensure they are safe. "Safe" is defined in s 19(1)(e) of the Act to mean that there is no risk, or, no risk apart from one reduced to a minimum, that the goods will cause death or personal injury. There are defences for the suppliers provided in s 10. The first is the compliance with safety standards found in any enactments (e.g regulations or subordinate legislation) or European Community obligations, also known as the due diligence defence.[166] The second concerns the reasonable belief that the goods would not be used or consumed in the United Kingdom.[167] This defence may seem peculiar at first sight because it means that suppliers in other countries do not have to conform with the safety requirements as lain down by the Act. This could be explained on the basis that since Part II of the Act imposes criminal liability on suppliers it is not apt to include foreign suppliers into the

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157 It is important to bear in mind the different types of defects that can be found in a product: manufacturing defects and design defects. In particular, the latter poses many problems as consumers are often unclear as to what to expect from the product. See Stoppa, "The Concept of Defectiveness in the Consumer Protection Act 1987: A Critical Analysis" (1992) 12 LS 210.

158 Section 5 of the Act. There are, however, qualifications to the definition of damage. See s 5(2) of the Act.

159 Who must be supplying the product in the course of business. See Walker, *Consumer Protection Act 1987: A Practical Guide* (London: Longman, 1987), section 10.4.2.

160 This is the same as the common law position. See *Roe v. Minister of Health* [1954] 2 QB 66.

161 This is the same as the definition in s 4 of the Consumer Protection Act 1987 and means the time the producer supplies the product.

162 As provided by the new s 11A of the Limitation Act 1980, which was added as a result of Schedule 1 of the Consumer Protection Act 1987.

163 As according to the provisions under the Limitation Act 1980. Cf. s 27 of the Limitation Ordinance, Cap. 347, LHK.

164 Section 10(2) of the Act.

165 Such as water, food, feeding stuff and fertiliser, gas, aircraft and motor vehicles, controlled drugs, and tobacco. These are usually covered by other Regulations.

166 Section 10(3)(a) and (b) of the Act.

167 Section 10(4)(a) of the Act.

operation of the Act.[168] There is also the defence available to retailers[169] of goods who, at the time of supply, do not know or have reasonable grounds to believe that the goods have failed to comply with the safety standards.[170] The last defence has to do with used goods. The supplier is absolved from criminal liability if he has indicated that the goods supplied are not new.[171]

Regarding the remedial actions that can be taken if unsafe goods are available in the market, the Secretary of State is empowered to serve prohibition notices[172] and notices to warn[173] on the supplier of such unsafe goods so that the offending goods can be taken off the market as quickly as possible. Moreover, the Act also provides for the suspension of the supply of goods which has contravened any safety provisions, and the supplier is required to refrain from supplying the goods for a period of up to six months.[174] Lastly, the forfeiture of unsafe goods is provided for under ss 16 and 17 of the Act.[175]

4. The Hong Kong Toys and Children's Product Safety Ordinance[176]

As can be seen from the discussion above, the Consumer Protection Act 1987 has a very broad scope of operation and covers some of the essential areas of consumer protection. On comparison, in Hong Kong there is very little protection of the type offered by the United Kingdom legislation. The only Ordinance which deals in a limited way with the issue of product liability and safety is the Toys and Children's Product Safety Ordinance. This Ordinance was enacted in 1993 and essentially employs the international safety standards for similar products.[177] There is also the general safety requirement similar to s 10 of the Consumer Protection Act 1987. Section 8 of the Ordinance defines the general safety requirement to mean that the toy or children's products are reasonably safe. Circumstances which are to be considered are also set out to assist in assessing whether the toy or children's product complies with the requirement.[178] Part IV of the Ordinance sets out additional controls on unsafe toys and children's products including the notice to warn, the prohibition notice, and the recall notice.[179] The defence of due diligence is available to the person who acted on the default of another, or who relied on information by another, and who also took reasonable steps to avoid committing any offence under the Ordinance.[180] However there

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168 As it would be impractical to impose and to enforce criminal liabilities on suppliers not within the jurisdiction of the U.K. and where there may be different safety standards.

169 Defined in s 10(5)(a) of the Act.

170 Section 10(4)(b) of the Act.

171 Section 10(4)(c) of the Act.

172 Section 13(1)(a) of the Act.

173 Section 13(1)(b) of the Act.

174 Section 14 of the Act.

175 For a discussion of the enforcement of the provisions in Part II of the Act see Cardwell, "The Consumer Protection Act 1987: Enforcement of Provisions Governing the Safety of Consumer Goods" (1987) 50 MLR 622.

176 Cap. 424, LHK.

177 Section 3 of the Ordinance requires that all manufactured, imported, or supplied toys must conform with standards as laid down by: (a) the International Voluntary Toy Safety Standard; (b) the European Standard EN71; and (c) American Society for Testing and Materials. Section 5(1) of the Ordinance uses the British Standards Institution's specifications for the safety standards of children's products.

178 Section 8(2) of the Ordinance.

179 Sections 10, 11 and 12 of the Ordinance.

180 Section 25 of the Ordinance.

must be a notice served to effect this defence and there is a time limitation for such notice.[181] The Secretary for Trade and Industry also has the power to make regulations concerning the safety of toys and children's products.[182] But the Ordinance does not, and cannot, do very much to promote a broader scope of goods to be covered under it as it only deals with toys[183] and children's products.[184] The term "child" is left undefined.[185] But it is not likely that the Secretary for Trade and Industry would add into the Schedule to the Ordinance products which do not clearly fall within the category of "toy" or "children's product".[186] Thus the hope of expanding the types of products that have to conform with requirements under this Ordinance is shattered, and there is an unsatisfactory situation in Hong Kong whereby only toys and children's products are governed by legislation.

5. Conclusion

Before this section comes to a close, it is important to stress that although there is always the common law to cover areas not addressed by legislation,[187] it is undoubtedly much more desirable to have the actual law written in black and white. This is especially true when one is talking about consumers who cannot afford to go to a legal adviser for the common law position on a subject every time there is a query. It is simply unrealistic. As general principles dictate, the law must be readily accessible to everyone, and regrettably, in Hong Kong, the consumer can hardly be described to fall into this category. But at least the proposed legislation is promising in that it widens the scope of consumer protection laws in Hong Kong. This is primarily done through the implementation of the Unconscionable Contracts Bill which has a wide potential of being applied to *all* consumer contracts, including credit contracts in which there is a void of legislation that governs it in Hong Kong.

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181 Section 25(2) of the Ordinance states that there must be seven clear days before the hearing for the notice to take effect. Leave of the court is also needed.

182 Section 35 of the Ordinance.

183 This is defined in s 2 of the Ordinance to mean "a product or material that is designed or clearly intended for use in play by a child".

184 This is defined in s 2 of the Ordinance to mean a product listed in the Schedule to the Ordinance, which includes items such as: babies dummies; baby's nests; baby walking frames; bottle teats; bunk beds; carry cots; child safety barriers; children's cots; children's high chairs; children's paints; children's safety harnesses; playpens and prams.

185 For a possible definition of the "child", see Cottrell, note 140 above, p. 75.

186 The power of the Secretary for Trade and Industry to do so is found in s 7 of the Ordinance. There does not seem to be any scope for the inclusion of products other than those as defined under s 2 of the Ordinance. In addition, s 7 refers to s 5 which narrows the type of the product down to children's products only.

187 For instance, we have already seen in this section the common law of negligence, through which manufacturers can be held liable on proof of negligence.

III. Consumer Redress[188]

A. Introduction

The consumer is considerably disadvantaged compared with the manufacturer or the business person. Although the spirit of the proposed laws is to provide more protection for the consumer it will be futile if the only method of enforcing them is through litigation. The void in more "consumer-friendly" means of consumer dispute-settlement only encourages manufacturers and business people to ignore any new laws aimed at protecting the consumer. The man in the street is hardly going to bother with lengthy court procedures and unaffordable court and lawyer fees when the cost can be grossly disproportionate to the amount that can be recovered; plus there is often the understandable phobia that laypersons have of the court system.[189] In addition, because there are minimal mechanisms in place in the court system in Hong Kong to encourage consumers to take class action or to allow consumer test cases to go to court,[190] it is doubly difficult for the consumer to assert his or her rights against the commercial party. The discussion below will first focus on the different types of consumer redress schemes available in other countries, followed by a short summary of the lack of channels for consumer-complaints in Hong Kong. An assessment of the pros and cons of the redress schemes will ensue.

B. Consumer Arbitration and Private Small Claims Courts

Consumer arbitration schemes abroad have not always proved to be effective. For example, in the United Kingdom where there is legislation to govern consumer arbitration[191] (and although there are over 25 such arbitration or conciliation schemes[192]) a lot of them do not work at all because consumers simply do not know they exist, despite the fact that they are

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188 This section is only concerned with channels for consumers addressing their grievances and is not concerned with the remedies available to the consumer. For a comprehensive discussion on the types of remedies available to the consumer see O'Grady, "Consumer Remedies" (1982) 60 Can Bar Rev 549.

189 This view is also echoed by the Commission Report on Sale of Goods and Supply of Services at 8.7.1.

190 Hong Kong does not have a class action procedure *per se* in its rules of the court, however, there are mechanisms for what is known as a representative action in which a party may sue on behalf of other plaintiffs in the same class. See Order 6 rule 3(a) and (b) of the Rules of the Supreme Court, Cap. 4 sub. leg. Consumers may also wish to consider the option of joining or consolidating their actions provided that their complaints relate to common questions of law or facts: see Order 15 rule 4 and Order 4 rule 9 respectively. The class action procedure can be found in other jurisdictions, for example, in the United States see Federal Rule of Civil Procedure 23 (1966). However the use of this procedure is limited to sums that exceed US$10,000 which cannot be the aggregate of the amount claimed by each claimant in the class. See the U.S. Supreme Court case of *Synder v. Harris* (394 US 332, 1969). See also O'Grady, note 188 above, p. 573 for a summary of countries which have in place procedures for class action. See Tur, "Litigation and the Consumer Interest; The Class Action and Beyond" (1982) 2 LS 135 p. 153 *et. seq.* For a comprehensive list of references and an excellent comparative discussion on the subject of collective redress by consumers see Chapter 8 of Miller and Harvey, *Consumer and Trading Law: Cases and Materials* (London: Butterworths, 1985).

191 Section 2(1) of the Consumer Arbitration Act 1988 purports to protect the consumer from being forced into an arbitration agreement in certain situations by commercial parties.

192 Examples of trade associations which have set up consumer redress schemes in the United Kingdom include tour operators, domestic laundry and dry-cleaning services, the photography industry, the footwear industry, glass and glazing, the motor industry, and mail order publishers.

established under the Codes of Practice of trade associations.[193] The other problem is that arbitration may take a very long time and this means that the consumer will have to use more of his or her own time because most do not wish to incur further expenses by employing a lawyer. But the main reason why such schemes are not very popular in the United Kingdom is because many consumers do not think that they are fair. The most recent survey by the National Consumer Council on the topic, which was as long ago as in 1979, showed that the county courts were regarded by consumers as the fairest out of the various consumer arbitration schemes available at the time.[194] It seems that the root cause of the problem is that legal representation plays such a crucial and decisive role in the arbitration picture that the consumer who does not have the benefit of such representation will not stand a good chance of success compared with the more professional business person who probably has a whole legal team for support. Therefore, in order that the consumer is not falsely led to believe that arbitration is the solution when it may pose just as many problems as going to court may entail, it is very important that a scheme can be devised whereby the consumer's position will be given the most consideration. There are also various other alternative consumer dispute resolution methods. In the 1970's private small claims courts were set up in England to offer a better channel for consumer dispute resolution. Despite their popularity with the public and their simple procedures, these voluntary schemes eventually collapsed because of the lack of funding.[195] It is understandably difficult to obtain secure and independent financing for a comprehensive system divorced from the established judicial machinery. However, in England at least, these schemes had shown that such arrangements do work as an alternative method of resolving consumer disputes.

C. Consumer Ombudsman

An option to overcome the difficulty with the funding of consumer redress schemes is to use business funds to appoint Ombudsmen.[196] This method has been mainly used by the insurance and banking industries in the United Kingdom. For example, the Insurance Ombudsman is vested with the power to act as counsellor, conciliator, adjudicator and arbitrator, and is employed by the Insurance Ombudsman Bureau which is comprised of a Board and a Council. Member companies which provide the financial backing constitute the Board but it is the Council which has a majority representing the public that oversees the

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193 Under s 124 of the Fair Trading Act 1973 the Director General of Fair Trading has a duty to encourage trade associations to prepare Codes of Practice.

194 See Goriely, "How well do consumer arbitration schemes work?" (1991) 141 NLJ 535.

195 These schemes were available in the London and Manchester areas and relied heavily on temporary funding from local authorities, charities, the legal profession and academic institutions.

196 The Ombudsman in Hong Kong only deals with administrative complaints and is known in his proper title as the "Commissioner for Administrative Complaints", whose office is established under the Commissioner for Administrative Complaints Ordinance. (Cap. 397, LHK). As a matter of interest, in order to ensure that the Ombudsman does not have a conflict of interest in any complaints heard by him, s 4 of the Ordinance specifies that the Commissioner (i.e. the Ombudsman) shall hold no other office for profit or reward without the approval of the Governor. There are at present nearly 40 government departments and organizations whose actions are capable of being investigated by the Commissioner (See Schedule 1 of the Ordinance). The Commissioner's role should therefore not be confused with a proper consumer Ombudsman who can deal with complaints concerning public as well as private bodies. However, there may be a possibility that the Ombudsman in Hong Kong, may, in future, deal with consumer complaints regarding governmental bodies. See below.

workings of the Ombudsman. Applicable rules of law are applied and decisions are published annually. A special feature is that decisions are binding on member companies only, which means that the public can resort to the courts if dissatisfied.[197] Regarding the proposed legislation discussed above, it is interesting to note that both the Supply of Services (Implied Terms) Bill and the Unconscionable Contracts Bill are applicable to public bodies and organizations.[198] It could therefore be argued that consumer[199] will be able to complain to the Commissioner for Administrative Complaints (the Ombudsman in Hong Kong whose jurisdiction is limited to complaints regarding governmental administrative activities) if a contract for either the supply of services has been made with a governmental body, or where the consumer alleges that an unconscionable contract has been made. Of course, the jurisdiction of the Commissioner for Administrative Complaints is restricted to those provided by the Commissioner for Administrative Complaints Ordinance.[200] If this argument can be put forward, there will be an incongruous situation whereby the consumer may only complain about governmental bodies and organizations to the "public" Ombudsman in Hong Kong.

D. A Scheme that is Integrated with the Court System

A more innovative approach to tackle consumer disputes can be found in Belgium. In order to allow the public to have easier access to justice, the European Economic Community in 1984 sponsored pilot schemes in the Justice of the Peace Courts of Deinze and Marchienne-au-Pont to deal specifically with consumer disputes. The schemes involved creating small claims courts that dealt exclusively with consumer disputes within the already established court system. These were made possible by the modern and broadly-drafted procedures of the Belgian Judicial Code, the usage of which was very relevant to consumer disputes and includes procedures equivalent to summary judgment and out of court settlement.[201] A more interesting procedure is known as "binding third party resolution" (*bindende derden beslissing*) which has the characteristics of arbitration but is less formal and if one party refuses to comply with the third party's decision the other party may take the case to court which in turn can only superficially review the third party's decision. This binding third party resolution procedure was done through the more informal medium of the court clerks. Out of 279 cases of consumer complaint, 115 were dealt with by this method.[202] This shows that most consumers do prefer an official but more informal channel of dispute settlement. Unfortunately, the schemes in Belgium were not continued as EEC funding was terminated two years after their inception.

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197 For a brief summary of other similar schemes in the United Kingdom see Thomas, "Alternative Dispute Resolution-Consumer Disputes" (1988) 7 CJQ 206.

198 See clause 2 of both Bills as to the definition of "business" which includes the activities of a board, commission, committee or other body appointed by the Governor or Government.

199 As defined under both of these Bills.

200 Cap. 397, LHK. See the Schedule of the Ordinance for the organizations to which the Ordinance applies.

201 Articles 1338 to 1344 and Articles 731 to 734 of the 1967 Belgian Judicial Code respectively.

202 For the details of such schemes in Belgium see Storme and Demeulenaere, "Innovations in the Judicial and Extra-Judicial Resolution of Consumer Disputes in Belgium". (1988) 36 AJCL 217

E. The Structure of Consumer Dispute-Resolution in Hong Kong

There are also other methods of dispute settlement apart from those described above. Consumers may be referred to the complaint section of a particular trade association. For example, in Hong Kong, there is the Transport Advisory Committee for complaints regarding transport services, and the Law Society has a committee that deals with complaints against solicitors. The Hong Kong consumer will usually first visit one of the Consumer Council's offices to lodge a complaint and the Council in turn will advise the consumer accordingly. If there is a specific complaints body for the complaint the Council will sometimes refer the consumer to it. Statistics reveal that during the 1992-1993 financial year the Council received a total of 9,436 complaints of which 43% of the complainants (4,058) obtained redress. 12% (1,132 complaints) were satisfactorily explained; 32% (3,020 complaints) were groundless; 7% (661 complaints) were unsubstantiated; and 7% (661 complaints) were unjustified. The total number of complaints received in the last few years hovered around 9,000.[203] However, there is simply no way of finding out what the true figure of consumer grievance is in Hong Kong, especially where the channels of redress are so limited. Figures from the United Kingdom show that in 1990, over 40% of adults had some cause of consumer complaint. If this can be used as an accurate mirror for Hong Kong, the actual number of consumer complaints would be far greater than that recorded by the Consumer Council. Thus there is all the more reason why urgent action should be taken to reconsider the existing consumer redress system in Hong Kong.

F. The Pros and Cons of Alternative Dispute Resolution in the Context of the Consumer

Like all systems, alternative dispute resolution has both advantages and disadvantages. On the positive level, privately organised systems often involve the use of expertise and specialists in the dispute resolution process which helps to make matters faster and easier for the consumer. If such systems are allowed to proliferate this will encourage more similar systems to be formed in different areas. The diversity and variation of different systems will provide the innovation for improvements. Above all, such privately organised systems offer choice to the consumer. At present in Hong Kong there is regrettably no such privilege for the consumer. If the sum claimed does not exceed $15,000 the Small Claims Tribunal is the only channel,[204] or if the amount is higher the court is one of the two choices available; the other alternative will have to be private arbitration, which may cost as much as the courts. In fact, very few consumers can afford the luxury of either. The major weakness of such systems is funding. Private consumer dispute settlements are usually funded by the trade association of that particular consumer industry. This easily calls into question the independence of such systems and whether the consumer really gets a fair result. The other main problem associated with private systems is the restrictiveness of their jurisdiction. As most of these systems are voluntary in nature the only thing traders need to do to avoid their jurisdiction is not to join, but making them mandatory will no doubt involve even greater problems.

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[203] Statistics obtained from the Consumer Council Head office show that in 1991 there were a total of 9,406 complaints received; in 1992, 9,282 and in 1993, 9,509 complaints. The figures show the number of complaints received annually by the Council.

[204] Section 5 and the Schedule of the Small Claims Tribunal Ordinance, Cap. 338, LHK.

Any consumer dispute resolution, whether publicly-funded or privately-organised, needs to possess certain characteristics for it to be successful. First, and perhaps most important to the consumer, is that any system needs to be inexpensive. Special considerations need to be taken when assessing the amount of the fee for using the method of dispute settlement so that the consumer is not deterred from pursuing the claim because of the possibility of having to pay a large sum just to use the system. Secondly, the method of redress should also pay special attention to the consumer's lack of experience so that they are not placed in a disadvantaged position. Voluntary assistance from lawyers in the form of *pro bono* work is a possibility and in such cases should be relatively straight-forward. The system should also be speedy. This includes, for instance, the time needed to initiate the procedures, the time of the actual hearing of the dispute, as well as the time between the hearing and the decision. The decision itself should be final unless there is some obvious error made by the assessor. Finally, it should be enforceable, and at some point the process should be allowed to integrate with court procedures so that limited appeals and enforcement of judgments can be dealt with in the conventional manner if the parties are unhappy.[205]

IV. Consumer Education

The above discussion will be worth very little if consumers in Hong Kong are not adequately made aware of their rights. At present there is not much publicity as to the means of protection offered to the consumer and how the protection can be invoked. This is likely due to two factors. The first is the fact that there is not much enacted legislation that deals directly with consumer protection. Secondly there is a possibility that there is public ignorance as to the functions and duties of the Consumer Council,[206] and as a result many are led to believe that the only channel of recovering their loss is in the courts, of which many people have a phobia and which people may not be able to afford the time and money to use. Hence most aggrieved consumers learn to live with the bad deal that they have made and to get smarter next time. If consumers are informed about their entitlements through wider publicity and education at an early age, the consumer, the manufacturer, the retailer and the advertiser will be more aware of the responsibilities and rights of the parties to a consumer transaction. Together with the "consumer-friendly" means of redress systems highlighted above, this is the only way that any new consumer legislation will be of benefit to the consumer.

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[205] From Sir Gordon Borrie, "Consumer Redress -- An Overview" [1991] Denning L J 23.

[206] In relation to products the Consumer Council has published a number of reports on the topic of consumer protection in Hong Kong, for example, the *Consumer Council Annual Report 1991*. It also publishes reports periodically as to products, and conducts tests for safety. See the annual *Choice Buying Guide*. See also the Consumer Council Ordinance (Cap. 216, LHK) for the statutory constitution, functions, etc., of the Council.

V. *The PRC's Consumer Protection Law*

The PRC's Protection of the Rights and Interests of Consumers Law[207] became effective on 1 January, 1994.[208] The Law covers an extensive scope of consumer protection although it does not provide for its actual enforcement. Its enactment is to be lauded as a great step forward for consumers in the PRC.[209] The Law covers both consumer commodities as well as consumer services, and contains chapters dealing with the rights of the consumer and the obligations of the business operator. However, the concepts of the consumer and the business operator are not defined anywhere in the eight chapters of the Law. The state has the responsibility to protect the lawful rights and interests of the consumer, and the longest chapter of the Law sets out the legal liabilities of the business operator for commodities and services provided to the consumer.

Consumer organizations are also provided for in Chapter 5 of the Law and consumers are given the right to participate in them.[210] As to consumer redress, the Law sets out a list of channels which include negotiation, mediation by a consumer council, arbitration by arbitration organizations, complaining to the relevant administrative department, and instituting legal proceedings in court. As to consumer education, the Law has distributed responsibility both to the mass media and the consumers themselves. While the former has to promote consumer protection and to control acts which are harmful to the consumer[211] it is the latter's duty to educate themselves of the rights they have as consumers.[212] Indeed, the dominant and recurring theme that runs through the Consumer Protection Law is "the customer is always right". Even the state has to "listen to the views and demands of consumers".[213]

VI. *Conclusion*

The proposed consumer protection law in Hong Kong is long overdue, but it is better to come late than never. As a highly commercialised society Hong Kong is unquestionably going to benefit from the new consumer protection law, however narrow its scope of protection may be. Nevertheless, the whole scheme of consumer protection in Hong Kong leaves much to be desired. Justice offered by the new law will be thwarted if consumers are only warranted their rights on paper but not provided with adequate means to enforce them in reality. This can also be said of the PRC Consumer Protection Law, which leaves a significant degree of uncertainty as to the actual method for its enforcement, however much it is a gesture of well-meaning by the National People's Congress. It is hoped that the Hong Kong Government will hastily consider other aspects of consumer protection such as consumer credit, consumer information, and the widening of the concept of product liability to cover all products. Instead

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207 Adopted at the 4th Session of the Standing Committee of the 8th National People's Congress and promulgated on 31 October 1993. [1994] 4 CLP 33.

208 Article 55 of the Law.

209 Chapter 4 of the Law provides that enforcement is the responsibility of the relevant state organisations.

210 Article 15 of the Law states, *inter alia*, that "A consumer shall have the right to supervise commodities and services as well as work on the protection of the rights and interests of the consumer."

211 Article 6 of the Law.

212 Article 13 of the Law.

213 Article 26 of the Law.

of clinging on to the *laissez-faire* attitude, perhaps it is now time that the Government considers adopting a new philosophy with regard to consumer protection. Whereas there is a trend in Western countries to deregulate their laws,[214] it may be suitable for the Hong Kong Government to adopt a more paternalistic role in protecting the consumer, given that Hong Kong does not presently enjoy an abundance of consumer protection laws that it urgently needs.

[214] Cf. Cohen, "What Role Should the Federal Government Play in Consumer Protection?" (1992) 20 CBLJ 86.

I. SALE OF GOODS (AMENDMENT) BILL 1994

A Bill to Amend the Sale of Goods Ordinance

1. Short title

This Ordinance may be cited as the Sale of Goods (Amendment) Ordinance 1994.

2. Interpretation

Section 2(5) of the Sale of Goods Ordinance (Cap. 26) is repealed and the following substituted--

"(5) Goods of any kind are of merchantable quality within the meaning of this Ordinance if they are--

(a) as fit for the purpose or purposes for which goods of that kind are commonly bought;

(b) of such standard of appearance and finish;

(c) as free from defects (including minor defects);

(d) as safe; and

(e) as durable,

as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances; and any reference in this Ordinance to unmerchantable goods shall be construed accordingly.".

3. Section added

The following is added before Part I--

"2A. "Dealing as consumer"

(1) A party to a contract of sale "deals as consumer" in relation to another party if--

(a) he neither makes the contract in the course of a business nor holds himself out as doing so;

(b) the other party does make the contract in the course of a business; and

(c) the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

(2) Notwithstanding subsection (1), on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer.

(3) It is for the person claiming that a party does not deal as consumer to prove that he does not.".

4. Implied undertakings as to quality or fitness

Section 16 is amended--

(a) by repealing subsection (1) and substituting--

"(1) This section provides for the circumstances in which, and the extent to which, there is any implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.";

(b) in subsection (2)--

(i) in paragraph (b), by repealing the full stop and substituting "; or";

(ii) by adding--

"(c) if the contract is a contract for sale by sample, as regards defects which would have been apparent on a reasonable examination of the sample.";

(c) by adding--

"(8) Except as provided by this section and section 17, and subject to the provisions of any other enactment, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.".

5. Buyer's right of examining goods

Section 36(1) is repealed.

6. Section substituted

Section 37 is repealed and the following substituted--

"37. Acceptance of goods

(1) Subject to subsection (2), the buyer is deemed to have accepted the goods--

(a) when he intimates to the seller that he has accepted them; or

(b) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller.

(2) Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under subsection (1) until he has had a reasonable opportunity of examining them for the purpose--

(a) of ascertaining whether they are in conformity with the contract; and

(b) in the case of a contract for sale by sample, of comparing the bulk with the sample.

(3) The buyer who deals as consumer cannot lose his right to rely on subsection (2) by agreement, waiver or otherwise.

(4) the buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

(5) The questions that are material in determining for the purposes of subsection (4) whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned in subsection (2).

(6) The buyer is not by virtue of this section deemed to have accepted the goods merely because the goods are delivered to another under a sub-sale or other disposition.".

Explanatory Memorandum

This Bill implements in modified form certain recommendations of the law Reform Commission relating to the sale of goods, as set out in Chapters 2, 3 and 5 of the Commissions's Report on Sale of Goods and Supply of Services (Topic 21, issued February 1990).

2. Clause 2 amends section 2(5) of the Sale of Goods Ordinance to provide that in considering whether goods are of merchantable quality regard shall also be had to--

(a) their appearance and finish;

(b) their freedom from minor defects;

(c) their safety; and

(d) their durability.

3. Clause 3 adds a definition of the term "deals as consumer" which is found in new section 37(3) in clause 6.

4. Clause 4(a) and (c) restates for greater ease of reference (but without change in legal effect) the provisions of section 16(1) of the Ordinance relating to implied undertakings as to quality or fitness of goods.

5. Clause 4(b) provides that in a contract for sale by sample the rule in section 17(2)(c) of the Ordinance prevails over the rule in section 16(2) of the Ordinance.

6. Clauses 5 and 6 deal with the circumstances in which a buyer is deemed to have accepted goods (and may therefore have lost his right to reject the goods in the event of a breach of condition by the seller). These clauses provide--

(a) that a buyer is not deemed to have accepted goods under section 37 (except by lapse of time) unless he has had a reasonable opportunity of examining the goods (clause 5; clause 6, new section 37(1) to (3)); these provisions will have particular effect in the case of signed "acceptance notes";

(b) that in considering whether a buyer should be deemed to have accepted goods under section 37 by virtue of lapse of time, regard shall be had to whether the buyer has had a reasonable opportunity to inspect the goods (clause 6, new section 37(5));

(c) that a buyer is not deemed to have accepted goods solely because he has disposed of the goods by a sub-sale (clause 6, new section 37(6)).

II. SUPPLY OF SERVICES (IMPLIED TERMS) BILL

A Bill to consolidate and amend the law with respect to the terms to be implied in contracts for the supply of services.

PART I
PRELIMINARY

1. Short title

This Ordinance may be cited as the Supply of Services (Implied Terms) Ordinance.

2. Interpretation

In this Ordinance--

"business" includes--

(a) a profession;

(b) the activities of a public body or public authority; and

(c) the activities of a board, commission, committee or other body appointed by the Governor or Government.

3. Contracts for the supply of services

(1) In this Ordinance a "contract for the supply of a service" means, subject to subsection (2), a contract under which a person ("the supplier") agrees to carry out a service.

(2) For the purposes of this Ordinance--

(a) a contract of service or apprenticeship is not a contract for the supply of a service;

(b) a contract is a contract for the supply of a service whether or not goods are also-

(i) transferred or to be transferred; or

(ii) bailed or to be bailed by way of hire,

under the contract, and whatever is the nature of the consideration for which the service is to carried out.

(3) The Governor in Council may by order provide that one or more of sections 5 to 7 shall not apply to services of a description specified in the order, and such order may make different provision for different circumstance.

[*cf. 1982 c. 29 s. 12 U.K.*]

4. "Dealing as consumer"

(1) A party to a contract for the supply of a service "deals as consumer" in relation to another party if--

(a) he neither makes the contract in the course of a business nor holds himself out as doing so;

(b) the other party does make the contract in the course of a business; and

(c) the services provided under or in pursuance of the contract are of a type ordinarily supplied or provided for private consumption or benefit.

(2) It is for the person claiming that a party does not deal as consumer to prove that he does not.

PART II
IMPLIED TERMS

5. Implied term as to care and skill

In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.

[*cf. 1982 c. 29 s. 13 U.K.*]

6. Implied term as to time for performance

(1) Where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, is not left to be fixed in a manner

agreed by the contract or is not determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time.

(2) What is a reasonable time is a question of fact.

[*cf. 1982 c. 29 s. 14 U.K.*]

7. Implied term as to consideration

(1) Where, under a contract for the supply of a service, the consideration for the service is not determined by the contract, is not left to be determined in a manner agreed by the contract or is not determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier will pay a reasonable charge.

(2) What is a reasonable charge is a question of fact.

[*cf. 1982 c. 29 s. 15 U.K.*]

PART III

MISCELLANEOUS

8. Exclusion or restriction of implied terms

(1) As against a party to a contract for the supply of a service who deals as consumer, the other party cannot, by reference to any contract term, exclude or restrict any liability of his arising under the contract by virtue of this Ordinance.

(2) Except as provided in subsection (1), where a right, duty or liability would arise under a contract for the supply of a service by virtue of this Ordinance, it may (subject to subsection (3) and the Control of Exemption Clauses Ordinance (Cap. 71)) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.

(3) An express term does not negative a term implied by this Ordinance unless inconsistent with it.

[*cf. 1982 c. 29 s. 16(1) & (2) U.K.*]

9. Savings

(1) Nothing in this Ordinance prejudices--

(a) any rule of law which imposes on the supplier a duty stricter than that imposed by section 5 or 6; or

(b) subject to paragraph (a), any rule of law whereby any term not inconsistent with this Ordinance is to be implied in a contract for the supply of a service.

(2) This Ordinance has effect subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description.

[*cf. 1982 c. 29 s. 16(3) & (4) U.K.*]

Explanatory Memorandum

This Bill implements the recommendations of the Law Reform Commission in Chapter 6 of the Commission's Report on the Sale of Goods and Supply of Services (Topic 21, issued February 1990) in relation to the terms to be implied in contracts for the supply of services.

2. Clauses 2 to 4 define and explain terms appearing in the Bill.

3. Clause 5 sets out the term to be implied as to care and skill by the supplier in a contract for a service supplied in the course of a business.

4. Clause 6 sets out the term to be implied as to time for performance by the supplier in a contract for a service supplied in the course of a business.

5. Clause 7 sets out the term to be implied as to the consideration to be paid in a contract for the supply of a service.

6. Clause 8 prevents the exclusion of these implied terms as against a consumer.

7. Clause 9 is a saving provision.

III. UNCONSCIONABLE CONTRACTS BILL

A Bill to empower courts to give relief in certain contracts found to be unconscionable.

PART I
PRELIMINARY

1. Short title and commencement

(1) This Ordinance may be cited as the Unconscionable Contracts Ordinance.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Trade and Industry by notice in the Gazette.

2. Interpretation

(1) In this Ordinance--

"business" includes--

(a) a profession;

(b) the activities of a public body or public authority; and

(c) the activities of a board, commission or committee or other body appointed by the Governor or Government;

"contract for the supply of services" means, subject to subsection (2), a contract under which a person agrees to carry out a service;

"goods" has the same meaning as in the Sale of Goods Ordinance (Cap. 26).

(2) For the purposes of this Ordinance--

(a) a contract of service or apprenticeship is not a contract for the supply of a service;

(b) a contract is a contract for the supply of a service whether or not goods are also--

(i) transferred or to be transferred; or

(ii) bailed or to be bailed by way of hire,

under the contract, and whatever is the nature of the consideration for which the service is to be carried out.

3. "Dealing as consumer"

(1) A party to a contract "deals as consumer" in relation to another party if--

(a) he neither makes the contract in the course of a business nor holds himself out as doing so;

(b) the other party does make the contract in the course of a business; and

(c) the goods passing or services provided under or in pursuance of the contract are of a type ordinarily supplied or provided for private use, consumption or benefit.

(2) Notwithstanding subsection (1), on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer.

(3) It is for the person claiming that a party does not deal as consumer to prove that he does not.

4. Application

Nothing in this Ordinance applies to contracts made before the commencement of this Ordinance.

PART II
UNCONSCIONABLE CONTRACTS

5. Relief where contract unconscionable

(1) If, with respect to a contract for the sale of goods or supply of services in which one of the parties deals as consumer, the court finds the contract or any part of the contract to have been unconscionable in the circumstances relating to the contract at the time it was made, the court may--

(a) refuse to enforce the contract;

(b) enforce the remainder of the contract without the unconscionable part;

(c) limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result.

(2) It is for the person claiming that a contract or part of a contract is unconscionable to prove that it is.

6. Matters to be considered by the court

(1) In determining whether a contract or part of a contract was unconscionable in the circumstances relating to the contract at the time it was made, the court may have regard to--

(a) the relative strengths of the bargaining positions of the consumer and the other party;

(b) whether, as a result of conduct engaged in by the other party, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other party;

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the other party or a person acting on behalf of the other party in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the other party.

(2) In determining whether a contract or part of a contract was unconscionable in the circumstances relating to the contract at the time it was made--

(a) the court shall not have regard to any unconscionability arising from circumstances that were not reasonably foreseeable at the time the contract was made; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this Ordinance.

(3) In considering the exercise of its powers under section 5 to grant relief in respect of a contract or part of a contract found to be unconscionable, the court may have regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made.

PART III
MISCELLANEOUS

7. Choice of law clauses

(1) Where the proper law of a contract is the law of Hong Kong only by choice of the parties (and apart from that choice would be the law of some other country) section 5 does not operate as part of the proper law.

(2) This Ordinance has effect notwithstanding any contract term which applies or purports to apply the law of some other country, where (either or both)--

(a) the term appears to the court or arbitrator to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Ordinance; or

(b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in Hong Kong, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.

8. Saving for other relevant legislation

(1) Nothing in this Ordinance removes or restricts the effect of, or prevents reliance upon, any contractual provision which--

(a) is authorized or required by the express terms or necessary implication of an enactment; or

(b) being made with a view to compliance with an international agreement which applies to Hong Kong, does not operate more restrictively than is contemplated by the agreement.

(2) A contract term which is incorporated or approved by, or incorporated pursuant to a decision or ruling of, a competent authority acting in the exercise of any statutory jurisdiction or function and which is

not a term in a contract to which the competent authority is itself a party shall not be regarded as unconscionable for the purposes of this Ordinance.

(3) In this section--

"competent authority" means any court, arbitrator or public body;

"enactment" means any Ordinance and any instrument having effect by virtue of any Ordinance;

"statutory" means conferred by an enactment.

Explanatory Memorandum

This Bill implements certain recommendations of the Law Reform Commission in Chapter 7 of the Commission's Report on Sale of Goods and Supply of Services (Topic 21, issued February 1990) in relation to unconscionability in consumer contracts.

2. Clauses 2 and 3 define terms used in the Bill.

3. Clause 4 limits the application of this Ordinance to contracts entered into after the commencement of the Ordinance.

4. Clause 5 confers on courts power to grant certain relief in a contract for the sale of goods or supply of services to a consumer where the contract is found to be unconscionable.

5. Clause 6 sets out matters the court may have regard to in determining whether or not a contract was unconscionable, or in exercising its power to grant relief.

6. Clause 7 has the effect of--

(a) ensuring that the application of the Ordinance to certain consumer contracts is not evaded by a choice of law clause;

(b) excluding from the ambit of the Ordinance contracts to which the law of Hong Kong applies only by virtue of a choice of law clause.

7. Clause 8 is a saving provision.

COMPULSORY MEMBERSHIP AND FREEDOM NOT TO ASSOCIATE --- AN INTERPRETATION AND APPLICATION OF ARTICLE 18 OF THE HONG KONG BILL OF RIGHTS

BIBY CHAN FUNG-KUEN*

I. Introduction

Since the enactment of the Hong Kong Bill of Rights (BoR) on 8 June 1991, there has been only scanty discussion of the freedom of association guaranteed in Article 18.[1] Even less has been the discussion on its negative aspect, i.e. the freedom not to associate. The reason for the silence may be that this negative freedom deals with problems arising mainly from compulsory membership, a predominant feature of the closed shop system which is not practised in Hong Kong. For a fuller understanding of the protection offered by the BoR and its implication on the existing practice of the community, this article will concentrate on discussing whether such negative right is embodied in Article 18 and, if it is, its possible application in the Hong Kong context.

Generally speaking, freedom of association refers the general capacity of people to join together for various goals. The existing law in Hong Kong imposes no restriction on this freedom except the basic requirement of registration.[2] If there are laws or company practices which compel people to join certain associations as a prerequisite of employment, it is unclear, *prima facie*, whether Article 18 can come into play by protecting the right not to associate. This kind of compelled membership is common in places where the closed shop system is practised. The closed shop system refers to the arrangement made between the trade union and the employer that the latter can only employ members of the union. In other words, trade union membership is a precondition of employment. To secure employment, one is compelled to join the union even against one's will. This system fosters collective bargaining and thus leads to greater stability in industrial relations. It strengthens the bargaining power of the workers, and negotiations with an employer are more efficient because the union is representative of the whole workforce. However, there are queries as to how the conflict between such corporate action and the individual right to refuse to join can be resolved. No help can be found in Hong Kong cases since the only reported Hong Kong case dealing with Article 18 concerns the positive right of forming trade unions and the right to take collective action.[3] The fundamental rule of statutory interpretation governs: a statute should be interpreted in such a way as to give effect to the intention of the legislature. Section 2(3) of the BoR clearly stipulates that the purpose of the Ordinance is to provide for the incorporation into the local system of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong. Therefore the *General comments* adopted by the Human Rights Committee of the United Nations and its decisions under the Optional Protocol should be

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1 Article 18(1) reads: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests".

2 See the Trade Union Ordinance, Cap. 332 and the Societies Ordinance, Cap. 151.

3 *Hong Kong Union of Post Office Employees and Others v. UK (HK)*, Case No. 1553, ILO Governing Body Committee on Freedom of Association, Reports of Feb/Mar 1991 and Mar 1992, ILO Doc. GB. 249/8114 (1991) and ILO Doc. GB. 252/9/13 (1992). Extracted in the BoR Bulletin, Nov/Dec 1992.

directly applicable. Unfortunately, none of the 21 *General comments* adopted so far touches on the scope of the freedom of association, nor is there any decision under the Optional Protocol that is on point.[4]

There is still a wealth of international experience that is of great assistance. In *Koowarta v. Bjelke-Peterson*,[5] Breman J. pointed out that the Commonwealth generally accepts that international methods of treaty interpretation can be applied in construing a statute which gives effect to a treaty.[6] In the benchmark case in Hong Kong concerning the interpretation of the BoR, *R v. Sin Yau-ming*, it was also explicitly stated that considerable assistance could be gained from the decisions of common law jurisdictions with a constitutionally entrenched Bill of Rights (in particular Canada and the US) and from the jurisprudence under the European Convention on Human Rights.[7] Accordingly, decisions of courts on similarly worded constitutional human rights guarantees may also be useful comparative sources.[8] Therefore, whether Article 18 of the BoR covers the freedom not to associate can be ascertained by a comparative approach.

II. The US Constitution

The American Bill of Rights is embodied in the Constitution of the US and its first ten amendments. Under the Constitution, there is no explicit article protecting the freedom of association. But it has long been held that this freedom is derived from the free speech guaranteed in the First Amendment. There are a few cases in which the plaintiffs alleged a violation of their right not to associate as they were compelled to join unions or associations by statute. The overriding concern of the US courts is whether the state has a compelling interest in having people associate for common good and whether the right of free speech is also violated. In *Railway Employees' Dept. v. Hanson*,[9] union membership was a precondition of employment. The Supreme Court ruled that there was no infringement of the First Amendment because the only support required of members was financial, i.e. payment of periodic dues to the union for collective bargaining, but not political affiliation. The same ruling applied in *Lathrop v. Donohue*[10] where a member of the Wisconsin bar argued that he could not be constitutionally compelled to join the integrated bar which used funds for the purposes of influencing legislation to which he objected. The Supreme Court again held that while working on legislative reforms was not the primary activity of the bar, the only duty imposed was to pay dues and not compelled association with anyone. The public interest in having an integrated bar which provided continuing legal education to lawyers, improved professional competence, and informed the public of the views of a majority of the state

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4 None of the decisions contained in *Selected Decisions of the Human Rights Committee under Optional Protocol -- Vols. 1 & 2* (Second to Thirty-Second Sessions) (New York: UN, 1985 & 1988) reflects views on the negative aspect of the freedom of association.

5 (1982) 153 CLR 168.

6 Ibid, p. 265.

7 (1991) 1 HKPLR 88, pp. 107-8.

8 For a general guidance to the sources of materials for interpreting the BoR, see A. Byrnes, "Figuring out the Bill", *The New Gazette*, October 1991.

9 (1955) 100 L Ed 2d 1112.

10 (1961) 6 L Ed 2d 1191.

lawyers on legislative matters affecting the adminstration of justice,[11] was emphasized. Support can be found from academics among whom is Professor Norman Cantor who thinks that forced "support" of distasteful causes is an inevitable concomitant of living in an organized society.[12]

When union membership means compelled association for the expression of political views against one's convictions, the court is more ready to recognize the disassociational right under the First Amendment. In *International Asso. of Machinists v. Street*,[13] union dues were expended, over the objection of the plaintiff employees, to support certain political projects. The Supreme Court made it clear that such use of funds for advancing political programmes did not justify the sacrifice of individual freedom not to associate. Similarly, in the context of compulsory membership to the state bar, the court ruled in *Reynolds v. State Bar of Montana*[14] and *Arrow v. Dow*[15] that the use of compulsory dues for political lobbying of which some members disapproved was objectionable on the ground of violating the right not to associate.

The American courts are unwilling to recognize the right not to associate because there is always overwhelming state interest to have compulsory membership, especially in fields concerning industrial relations and integration of professionals. The only exception is when free speech is also impeded. The derivative nature of the freedom of association makes it a right of which recognition is dependent on whether the primary right of free speech is also violated. As a result, compulsion to pay dues is usually acceptable. Caution should be taken in applying the American jurisprudence to the Hong Kong context because under our BoR, freedom of expression (Article 16) and freedom of association are two distinct rights and their linkage does not necessarily affect the interpretation of Article 18.[16]

III. The Canadian Charter of Rights and Freedoms

Freedom of association is guaranteed by s 2(d) of the Canadian Charter. The Charter is formulated differently from other international treaties. Its first section is a general limitation clause by which the restriction on the various rights and freedoms is "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The objective of enacting the Charter is to ensure that Canada is a free and democratic country which endeavours to uphold fundamental rights and liberties. In line with this objective, Dickson CJC, in *R v. Oakes*, reiterated that "faith in social and political institutions which enhance the participation of individuals and groups in society"[17] was a predominant

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[11] Ibid, p. 1206. Similar rulings can be found in: *Sams v. Olah* 25 L Ed 2d 94; *Re Discontinuation of State Bar* (1980) 93 Wis 2d 385; and, *The Florida Bar* (1983, Fla) 439 So 2d 213.

[12] Norman L. Cantor, "Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association" (1983) 36 Rutgers L Rev 3, p. 25.

[13] 6 L Ed 2d 1141.

[14] (1983) 40 ALR 4th 669.

[15] (1982) 544 F Supp 458.

[16] This derivative nature of the freedom of association under the American Constitution is also the reason why the Canadian Supreme Court refused to adopt American cases in *Lavigne v. OPSEU* 81 DLR (4th) 545 to ascertain whether there was a disassociation right in the Canadian Charter.

[17] [1986] 1 SCR 103, p. 136.

feature of such a country. In *R v. Big M Drug Mart Ltd*, he emphasized again that the interpretation of the Charter had to give effect to the purpose of such a guarantee.[18] The Charter also "has as its object the improvement of the condition of less advantaged persons".[19]

It can thus be argued that the Canadian courts are more ready to accept an interpretation of the Charter which has a positive influence in society by improving the quality of life of the people. In this light, the positive right of association which manifests itself most frequently in the formation of trade unions for collective action to pursue common goals seems more acceptable than its negative aspect which emphasizes individual autonomy and the right not to be identified with others.[20]

Therefore, it is not surprising to find that in *Lavigne v. Ontario Public Service Employees Union* (OPSEU),[21] the test case in Canada on freedom of association, the Supreme Court relied heavily on *Reference re Public Service Employee Relations Act*,[22] in which many judges preferred the view that the purpose of freedom of association was to attain individual goals by cooperating with others.[23] It then concluded that freedom of association was meant to protect the coming together of individuals to pursue common goals and the freedom not to associate was thus not recognized. A series of cases gives the same interpretation of s 2(d).[24]

Though based on different grounds, the Canadian courts, like their American counterparts, are not eager to read into the Charter the disassociational right. Again, attention should be drawn to the fact that there is no similar limitation clause in the ICCPR or our BoR comparable to the first section of the Charter. Neither is there any specific reference to the pursuit of a free and democratic society. Therefore, the Canadian approach, which relies so much on the interpretation of s 1 in rejecting the freedom not to associate, must be dealt with care.

IV. The German Basic Law and the Irish Constitution

In some European countries, it is well accepted that the freedom not to join trade unions is a correlative right of the freedom to join. France, Belgium, the Netherlands and Italy are notable examples. This liberal attitude can be explained by the development of the labour movement there where trade unions are formed with clear ideological and political inclinations. Compulsory membership is thus wholly unacceptable. Even in countries where

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18 [1985] 1 SCR 295, p. 344.

19 *RSO* 1980, 779, cited in Beaudoin and Ratushny (eds), *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 2nd ed 1989).

20 This is also one of the reasons of dissent of Judge Sorensen in the marked case *Young James & Webster v. UK* (1981) 4 EHRR 38, p. 62.

21 See note 17 above.

22 (1987) 38 DLR (4th) 161.

23 Ibid. Per Dickson CJC, McIntyre J and Le Dain J, pp. 173, 216 & 239 respectively.

24 See, for example, *Arlington Crane Service Ltd v. Ontario (Min. of Labour)* (1988) 56 DLR (4th) 209 and *Re Pruden Building Ltd and Construction & General Workers' Union* (1984) 13 DLR (4th) 584.

the labour movement has not developed along political lines, like West Germany and Ireland, the courts are still willing to hold that closed shop systems violate fundamental rights.[25]

Article 9(3) of the German Basic Law 1949 guarantees the freedom of association. The suggestion to insert the sentence "Compulsion to join [an association] may not be exercised" in the Article was dropped because of its effect on the labour movement. However, German academics support that the freedom not to join is still protected by either Article 9(3) or Article 2(1) in which the general freedom to act is guaranteed.[26] In a case where a collective agreement was imposed into the employment term of an employee whose union was not a party to the agreement, the court held that Article 9(3) was violated because this arrangement effectively forced the employee to join other unions which were parties to that agreement.[27] But what is the basis for objection to forced membership? The court later described that the objective of Article 9(3) was to ensure association-pluralism.[28] It seems that freedom of association and freedom of choice are linked together. That is, one should be free to choose between competing unions and compulsory membership is not acceptable because it will deprive people of choice. The inadequacy of this argument is that in situations where choice of unions is available and yet the person is unwilling to join any one at all, he will be devoid of protection.

The Irish attitude is equally liberal. In *National Union of Railwaymen v. Sullivan*,[29] the Supreme Court held that a restriction on the worker's choice of unions which had sole bargaining rights was a violation of the freedom of association protected by Article 40(6)(1)(iii) of the Constitution. It is because "to deprive a person of the choice of persons with whom he will associate is a denial of the right of association".[30] Based on the notion of choice, this reasoning is as inadequate as the German court's. Later in *Educational Co. of Ireland v. Fitzpatrick*,[31] the marked case showing the Irish attitude towards the closed shop system, a more convincing reasoning was put forward. In this case, nine non-union employees were pressured to join the union or be dismissed. Budd J at first instance held explicitly that under the Constitution a citizen cannot be deprived of the right to join or not to join such association or union as he or she pleases. If a citizen is free to form or join any association, "that obviously does not mean that he must form or join . . . but that he may if he so wills".[32] The decision was upheld in the Supreme Court with similar opinion.

So it is clear that both the German and Irish Constitutions, which have similar protection of freedom of association, recognize the negative aspect of the freedom. The German court bases its support on the notion of choice, which, as explained, will render the freedom not to associate a much narrower meaning. But the Irish court, as noted in *Fitzpatrick*, gives a more liberal interpretation, in that freedom of association entails a freedom as to its exercise. So the freedom not to associate is recognized as a right of itself.

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25 A brief comparison of the labour movements in various European countries is seen in M. Forde, "The 'Closed Shop' Case" (1982) 11 ILJ 1, p. 5.

26 See Ferdinand Von Prondzynski, *Freedom of Association and Industrial Relations -- A Comparative Study* (London and New York: Mansell Publishing Ltd, 1987), p. 200.

27 BAG 4 (Ferderal Labour Court [Germany]), 22, p. 25.

28 BAG 19, 27, at 226.

29 [1947] IR 77.

30 Per Murnaghan J, p. 102.

31 [1961] IR 345.

32 Ibid, p. 362.

It is a wider interpretation because compulsory membership will then be objected to solely for the compulsion itself, irrespective of the choices of unions that are available.

V. The European Convention on Human Rights

The judgments and decisions held by the European Commission and the European Court of Human Rights have been of great assistance in interpreting the BoR. Article 11 of the European Convention is nearly an identical provision of Article 22 of the ICCPR and thus Article 18 of the BoR. The main differences are: in Article 11 of the Convention, freedom of peaceful assembly is also included; the permissible limitation of "public order" (*ordre public*), as in the ICCPR and the BoR, is substituted by "prevention of disorder or crime"; and, there is no specific reference to the International Labour Organization (ILO) Convention of 1948 concerning freedom of association and protection of the rights to organize.

In the early stages of adjudication, the Commission and the Court were reluctant to recognize the negative aspect of the freedom of association. Later, it adopted a "sitting on the fence" approach, avoiding direct clarification of the scope of the freedom, and not until 1993 did it admit explicitly such negative right. In the case *National Union of Belgian Police* (1975),[33] it was alleged that the Belgian Government had violated Article 11(1) because it refused to recognize the NUBP as one of the most representative organizations which the Minister had to consult by law. An increasing number of members of NUBP left to join other unions that were better recognized. They were, in a sense, compelled to join other unions. While recognizing the causal relationship between the drop in membership and the government policy, the court held that the general policy of restricting the number of organizations to be consulted was not on its own incompatible with trade union freedom.[34] In other words, only the positive freedom to join or remain a member was recognized.

In the benchmark case *Young, James & Webster v. UK*,[35] both the Commission and the Court held that there was a violation of the freedom of association in cases of compulsory membership under the closed shop system. But their reasoning was circuitous because they avoided giving a clear recognition of the negative aspect of the freedom. In 1975, a closed shop agreement was made between the British Rail and three trade unions, so that membership of the unions became a prerequisite of the continued employment of certain staff, including the three applicants. The applicants refused to join because they insisted on individual choice. In addition, Young and Webster objected to union policies while James objected to political affiliation of the unions. Refusing to discuss whether Article 11 protected both a positive and a negative right to join,[36] the Commission concluded that the violation of Article 11 stemmed from the fact that the closed shop arrangement was concluded after the applicants had taken up their work. Their right to form or join the trade union was thus interfered with. It suggested that the situation might have been different if the closed shop arrangement had been a term of employment. In this way, the Commission had in fact

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33 April-October 1975, Ser.A, Vol. 19.

34 Ibid, para 45.

35 (1980) 3 EHRR 20 before the Commission and (1981) 4 EHRR 38 before the Court.

36 3 EHRR 20, para 157, 165.

introduced the caveat that Article 11 would not apply if the employee voluntarily accepted compulsory membership as one of the contract terms.[37]

The Commission's reasoning is difficult to accept. First, in accepting that compulsory membership leads to a violation of Article 11, the Commission effectively admits that Article 11 includes the right not to associate. Second, there seems to be a mix up of a breach of the employment contract and a violation of the Convention. If the dismissal is merely a breach of the contract term, the Convention should be inapplicable. If the dismissal is due to a violation of the Convention, whether the closed shop arrangement is concluded before or after the contract should be irrelevant.[38]

Equally illogical is the Court's decision. On the one hand, it declined to define the substance of Article 11.[39] On the other hand, it admitted that "[t]he situation facing the applicants clearly runs counter to the concept of freedom of association in its negative sense."[40] Instead of recognizing the existence of a disassociational right, it relied on a hypothesis that:

> Assuming that Art. 11 does not guarantee the negative aspect of that freedom on the same footing as the positive aspect, compulsion to join the particular trade union may not always be contrary to the Convention.
>
> However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion [which] strikes at the very substance of the freedom guaranteed by Art. 11.[41]

Article 11 will be considered violated in a case of compelled membership when and only when freedom of non-membership is protected. The only logical deduction from this judgment is that the freedom not to associate must be embodied in the freedom of association, though the Court refused to admit it.

The strongest reason for objecting to such an interpretation can be found from a review of the drafting history of the Convention.[42] Article 20(2) of the Universal Declaration of Human Rights 1948 stipulates clearly that "[n]o one may be compelled to belong to an association." However, such a clause was omitted in the European Convention on account of the foreseeable difficulties raised by the closed shop practice in some countries.[43] Also, neither the ICCPR nor the ICESCR[44] confers any specific right not to join a union. The ILO Conventions Nos. 87 and 98 do not prohibit the closed shop practice as well.

The Court's reply was that such deliberate omission did not necessarily mean that:

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37 Anne Staines, "Constitutional Protection and the European Convention on Human Rights -- An Irish Joke?" 44 MLR 149.

38 See note 35 above, the dissenting view of Mr J.E.S. Fawcatt at p. 32, para 7.

39 See note 20 above, p. 53, para 51.

40 Ibid, p. 54, para 55.

41 Ibid.

42 According to Article 32 of the Vienna Convention on the Law of Treaties 1969, the preparatory work of the treaty and the circumstances of its conclusion can be resorted to to ascertain the meaning of a certain provision.

43 See the report of the Conference of Senior Officials submitted to the Committee of Ministers on 19 June 1950 contained in *Collected Edition of the Travaux Preparatoires*, vol. IV, p. 262.

44 International Covenant on Economic, Social and Cultural Rights.

> the negative aspect of a person's freedom of association falls completely outside the ambit of Art. 11 and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Art. 11 as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee.[45]

Effectively, the Court recognised that the right not to associate can be invoked under Article 11, at least in cases where compulsion results in dismissal. The rationale seems not so much to be the notion of choice but the objection to the compulsion itself, because the Court stated that "any freedom of action of choice left to the applicants would not in any way have altered the compulsion to which they were subjected".[46] Obscurely, the Commission and the Court have recognized the existence of an independent right not to associate.

The fallacy of justifying the right not to associate by the notion of choice is demonstrated in the recent case *Sibson v. UK*.[47] The applicant was dismissed by his union and he joined another. Because of his colleagues' threat to strike if he continued to work with them, the employer requested the applicant either to rejoin his previous union or be posted at another workplace. He refused to take the choice and was dismissed. The applicant claimed that the compulsion imposed on him to join the first union or be relocated violated his negative freedom of association. Both the Commission and the Court held that there was no such violation. By implying into the contract a term that the employer had a contractual right to require the applicant to work at another site, they held that the applicant was not "compelled" since there was no closed shop practice and he was given a choice either to join the first union or to be relocated. The motive of the employer in exercising this contractual right was held to be irrelevant.[48]

The fallacy is that the choice is, in practical terms, non-existent since the applicant was unwilling to return to his first union while relocation would bring to him less favourable conditions of employment. The artificial imposition of a contractual term and a refusal to inquire into the employer's motive for exercising the contractual right, which was obviously aimed at exerting pressure on him, are evidence that the Commission and Court are actually turning a blind eye to a situation of compulsion comparable to a closed shop practice.

Shortly after *Sibson*, the Commission and the Court in *Sigurdur A. Sigurjonsson v. Iceland*[49] adopted a much more liberal approach of interpretation which best manifests the vigour and flexibility of interpretation of international treaties as enshrined in Article 31 of the Vienna Convention on the Law of Treaties 1969. In that case, the applicant's taxi licence was revoked after he had refused to continue to be a member of Frami, an automobile association in which membership, by law, was a prerequisite for acquiring such a licence. Both the Commission and the Court agreed that Article 11 had to be viewed as encompassing a negative right of association, though it was not necessary to consider whether this right was on equal footing with the positive one.[50] The Commission also considered that "the notion

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45 See note 20 above, para 52.
46 See note 20 above, para 56.
47 (1993) 17 EHRR 193.
48 Ibid, p. 201, paras 31 and 32.
49 (1993) 16 EHRR 462.
50 Ibid, p. 471, para 57 and p. 479, para 35.

of a freedom implies some measure of freedom of choice as to its exercise".[51] That means if one is free to associate, one is also free not to exercise this freedom. Effectively, the right not to associate is recognized as an independent right regardless of the choices available. Most important of all, they reiterated that the Convention is a living instrument which must be interpreted in light of present day conditions. Despite the drafting history of the Convention, the current development of international cooperation demonstrates a change in attitude towards the closed shop practice. Many countries have established national safeguards to protect the negative aspect of the freedom of association (e.g. by enacting laws on unfair dismissal). Recent international consensus is that such a disassociational right should be protected. Article 11(2) of the Community Charter of the Fundamental Social Rights of Workers, adopted by 11 European countries on 9 December 1989 guarantees such disassociational right. On 24 September 1991, the Parliamentary Assembly of the Council of Europe unanimously adopted a recommendation to insert a sentence to this effect into Article 5 of the European Social Charter. The Committee of Independent Experts, set up to supervise the implementation of the Charter, considered the existence of such a right and expressed disapproval of the closed shop practices.[52] At the international level, state members are increasingly receptive to the idea that the negative aspect of the freedom of association should be safeguarded. The interpretation of international treaties should give effect to the uniform recognition of such a right since Article 31 of the Vienna Convention stipulates that in interpreting a treaty, any related subsequent agreement and instrument can be taken into account. The decision of the case and the approach of interpretation adopted are of useful reference to Hong Kong in interpreting Article 18 of the BoR.

VI. Application of the Freedom not to Associate in Hong Kong

Based on the discussion above, we may come to the conclusion that Article 18 of the BoR embodies the right not to associate. This right is based on the protection of individual autonomy and freedom to exercise one's own rights. Compulsory membership by threat of dismissal will invoke the protection of Article 18 though it is still unclear whether anything short of dismissal will give rise to the same protection. Problems of compulsory membership mainly arise from closed shop systems. In Hong Kong, the principal safeguards for the positive freedom of association are provided for by the Societies Ordinance[53] under which the government has to be notified of the formation of any association. The Trade Union Ordinance[54] provides that all workers and employers can form associations for collective bargaining purposes and regulation of industrial relations. The only requirement is registration with the Registrar of Trade Unions. Under Part IV-A of the Employment Ordinance,[55] any employee has the right to become a union member and to participate in union activities. Section 21B(2) prohibits the employer from interfering with his employees' exercise of their right. He therefore cannot dismiss or penalise any employee for being a union member or joining union activities. These Ordinances give effect to Hong Kong's obligations to the ILO

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51 Ibid, para 55.
52 Ibid, p. 479, para 35.
53 Cap. 151, LHK.
54 Cap. 332, LHK.
55 Cap. 57, LHK.

Convention No. 87.[56] While the freedom to organize is clearly protected, its negative aspect is not covered by any legislation. True as it is that the closed shop system has not been practised here, it is deemed legal under existing law.

Since the freedom not to associate is guaranteed under Article 18, any closed shop arrangement has to be justified by the permissible limitations listed in Article 18(2), which reads:

> No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. . . .

There are cases which have been relied on frequently to explain the meaning of each kind of permissible limitation. "Prescribed by law" means that the restriction must be provided for by domestic law which is easily accessible to people[57] and is of such clarity that it can give guidance on people's future conduct.[58] It must be in the interest of protecting national integrity against force (national security) or public security, ensuring a smooth functioning of society (public order [*ordre public*])[59] or protecting public health. Alternatively, it must be necessary for the protection of public morals so as to maintain the respect for fundamental values of the community[60] or the rights and freedoms of others. As a whole, it has to be shown that the infringement of the right not to associate is necessary in a democratic society. According to *Handyside v. UK*,[61] "necessary" is not as flexible as expressions like "useful" or "desirable". Pluralism, tolerance and broadmindedness are hallmarks of a democratic society. Lastly, there must be a pressing social need to justify such a restriction which is proportionate to the legitimate aim.

To a certain extent, compulsory membership is practised in Hong Kong in relation to professional bodies. Many professions have established their own institutes and societies like the Hong Kong Institute of Architects, Institute of Planners, Law Society, Bar Association, Society of Accountants, etc. These associations are different from trade unions in that they are formed not for collective bargaining purposes but for maintaining professional standards and practices by providing continuing education programmes, conducting examinations and upholding ethics and discipline within the profession. Most of them, e.g. in the fields of Architecture, Engineering, Dentistry and Surveying, do not enforce membership since, by law, membership is not a prerequisite for acquiring permission to practise. Requirements of registration usually include membership of *either* the professional association in Hong Kong

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[56] For a more detailed analysis of the trade union legislation in Hong Kong, see Chow Kwok-keung and Ng Shek-hong, "Trade Unionism, Collective Bargaining and Associated Rights: The Case of Hong Kong" (1992) 22 HKLJ 293 and Ng Shek-hong,"Employment and Human Rights in Hong Kong: Some Recent Developments" (1994) 24 HKLJ 108.

[57] *The Sunday Times v. UK* (1979) 2 EHRR 245.

[58] *Malone v. UK* (1985) 7 EHRR 14.

[59] Siracusa Principle No. 22 in (1985) 7 HRQ 3.

[60] Siracusa Principle No. 27, ibid.

[61] (1976) 1 EHRR 737.

or other recognized institutions, relevant qualifications and experience.[62] But for the Hong Kong Society of Accountants, Law Society and Bar Association, membership is compulsory:

> Professional Accountants Ordinance:[63]
> s 3 Incorporation of Society
> The persons registered as professional accountants under section 22 shall --
> . . . .
> (b) be known as the Hong Kong Society of Accountants.
>
> Legal Practitioners Ordinance:[64]
> s 6 Practising Certificates -- Solicitors
> . . . .
> (3) A practising certificate shall not be issued . . . unless the applicant has . . . paid to the Society the membership subscription . . . .
> s 30 Practising Certificates -- Barristers
> . . . .
> (3) [A] practising certificate may only be issued to an applicant who has paid to the Hong Kong Bar Association the membership subscription . . . .

Refusal to join these associations means deprivation of one's ability to practise his profession in Hong Kong. Will this practice of compulsory membership violate the right not to associate under Article 18?

Several European cases give a consistent judgment that legal compulsion of membership to professional associations does not violate the right not to associate. They confirm that Article 11 of the European Convention offers its protection only in respect of private associations and trade unions.[65] Professional associations, by virtue of their legal nature and public function, are public-law institutions whose practice is outside the scope of Article 11. The case *Le Compe, Van Leuven and De Meyere v. Belgium*[66] concerns compulsory membership to the Medical Association. Both the Commission and the Court clarified that freedom of association does not prohibit the compulsion of people belonging to public-law institutions like a province, a district or a strictly regulated professional organization which aims to maintain high quality services for the public. However, if there is not a violation, there is a further requirement that such compulsory membership must not prevent practitioners from forming together or joining other professional associations.[67] In

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62 See Cap. 156, Dentists Reg. Ord., Cap. 161, Medical Reg. Ord., Cap. 408, Architects Reg. Ord., Cap. 409, Engineers Reg. Ord., Cap. 417, Surveyors Reg. Ord., Cap. 418, Planners Reg. Ord.

63 Cap. 50, LHK.

64 Cap. 159, LHK.

65 See *X v Sweden*, Application No. 6094/73, D&R 9, p. 5 and Dec. Adm. Com. Ap. Application No. 9150/80, 9 March 1981 (unpublished), discussed in Council of Europe, Stiasbourg: *Digest of Case-Law relating to the European Convention on Human Rights Vol. 3* (Koln: Carl Heymanns-Varlag KG, 1984), p. 517.

66 (1981) 4 EHRR 1.

67 Ibid, para 64 and 65.

other words, there must exist some other similar bodies which those practitioners are free to join. Obviously, the Commission and the Court tend to strike a balance between community need and individual freedom. While compulsory membership is tolerated for the common good, personal choice equally cannot be neglected. Similar judgment was given in another case[68] in which the plaintiff complained of compulsory membership to the Hamburg Bar Council. The Commission held that the Bar Council was not a private organization but a public institution created by legislation in view of the importance of the legal profession for the administration of justice. There should not be a departure from the case-law of *Le Compe*.

The same reasoning can be applied in Hong Kong. The Hong Kong Society of Accountants is incorporated by the Professional Accountants Ordinance, Cap 50. Its responsibilities are mainly the regulation of the practice of the accountancy profession and the maintenance of professional integrity. It is also empowered by the Ordinance to make related by-laws.[69] It can be argued that the Society is a public institution whose practice of compulsory membership is for the common good. Instead of being incorporated by law, the Law Society is established under the Companies Ordinance (Cap. 32) while the Bar Association is established under the Societies Ordinance (Cap. 151). But the nature of their operation is no different from the public institutions as discussed in those European cases. Empowered by the Legal Practitioners Ordinance,[70] the Law Society scrutinizes the professional qualifications of members by issuing practising certificates. It provides continuing education to members, and hears complaints about professional misconduct. Also, its Council is empowered to make rules regulating the practice of the profession. Similarly, the Bar Association handles disciplinary matters, and its Code of Conduct, which is binding on all members, is the most effective instrument to ensure that professional service of a high quality is provided to the public. As a whole, both of them can be regarded as public bodies established in the interest of the public to which the protection of Article 18 does not extend. In short, so long as existing laws do not prohibit the forming of other similar professional associations, which most likely cannot enjoy equal status as the existing ones, compulsory membership in this area is allowed.

VII. Conclusion

The cases in other jurisdictions, especially those adjudicated under the European Convention, give considerable guidance to the interpretation of Article 18 of the BoR. It seems quite clear that freedom of association embodies a correlative right not to associate on the basis that individual autonomy as to the exercise of one's own rights should not be interfered with. But this right is not absolute. When there is a clear societal interest in having forced membership, e.g. for the regulation of professional practice, this individual right has to give way. In the Hong Kong context, the closed shop system is not acceptable unless it is justified by the permissible limitations listed in Article 18(2) of the BoR. But the compulsory membership to some professional bodies is legitimate because of the public nature of these bodies and their importance in maintaining the smooth operation of the society. After all, the protection

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[68] Dec. Adm. Com. Ap. Application No. 9164/80, 5 May 1981 (unpublished), discussed in Council of Europe, Strasbourg, note 65 above, p. 516.

[69] Section 8 of the Professional Accountants Ordinance, Cap. 50.

[70] Cap. 159, LHK.

of human rights, except in extreme cases like those involving degrading treatment, is always part of a balancing exercise in which individual freedoms and liberties are weighed against the interests of society as a whole.

CHINA'S (RE)-ACCESSION TO THE GATT AND THE IMPACT OF THE URUGUAY ROUND AGREEMENT

JOHN D. PARSONS*

I. Introduction

The People's Republic of China (PRC) has sought to join the General Agreement on Tariffs and Trade (GATT) since 1986.[1] The negotiations have taken longer than any other country's with the exception of Poland, another centrally-planned non-market economy (NME). The PRC has instituted many economic reforms and there is no doubt that China's markets are far more open than a decade ago. China feels it is more than ready to participate in the GATT. Yet among the other GATT CONTRACTING PARTIES[2] (CPs) there are still many questions being raised as to China's readiness for GATT and vice versa. A complicating factor with regard to China's application is the conclusion of the Uruguay Round of Multilateral Trade Negotiations. The Uruguay Round Final Act[3] stands to enhance the world trade regime by broadening the scope of the GATT and so creates challenges for reform in the PRC.

There is no doubt that China is playing a greater and greater role in international trade. To have such a sizeable power outside the GATT seems incongruous. However, it is precisely due to China's potential clout that the CPs have gone slowly in allowing the PRC to take a place in GATT.

The issues raised by China's application go to the very basis of the GATT for it is an agreement among states whose underlying economic premise is the market economy -- a system rejected by the PRC until very recently. Certainly there are members of the GATT whose economies are not easily accessible, but in no way are any of the major GATT members even close to the centrally-planned economic system of China. NMEs have joined the GATT in the past (Poland, Romania, Hungary) but these were relatively small markets; even so their accession protocols were strict, and special rules were applied to them.

China is unique both for its economic size and for its multifarious system of non-market controls. China announced its "Open Door Policy" in 1978 and has pursued reforms since then. The question is whether these reforms have gone far enough. A difficulty for China is the fact that the GATT has not stood still during this period of reforms in China. The Uruguay Round has resulted in a strengthened GATT. First, there is the creation of the new World Trade Organization (WTO)[4] -- with this change comes a true institutional framework to enforce the GATT. Second, the Uruguay Round Agreement has broadened the GATT to cover new areas such as intellectual property rights, trade-related investment measures and

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1 The GATT Director-General received notice of the PRC Government's decision to "seek resumption of its status as a contracting party to GATT" on 14 July 1986. GATT Doc. L/6017.

2 The term "CONTRACTING PARTIES" in capital letters is a term of art referring to all the members collectively whereas "Contracting Party" is used for individual members.

3 MTN/FA 15 December 1993.

4 The first draft of the Uruguay Round Final Act referred to the "Multilateral Trade Organization or MTO" but was amended to adopt the name "World Trade Organization or WTO." MTN/FA/Corr.1 15 December 1993.

trade in services. These new developments strengthen the CPs commitment to transparency in regulations, to market access, and to compliance with the GATT regimes.

The premise of this paper is that given the changes to the GATT and given the incomplete reforms in China, China is not yet ready for membership in the GATT. The Central Committee of the Chinese Communist Party has itself given the end of this century as a target for completion of reforms.[5] Such a target is likely optimistic. To give China membership before ensuring that reforms have gone far enough and have taken root would lead to the distortion of the world trade regime.

The purpose of this paper is to examine the requirements of the GATT and see whether China measures up to them. Therefore, an overview of the relevant GATT Articles, the history of the GATT as it relates to China and the results of the Uruguay Round of Multilateral Trade Negotiations will be provided. In addition to a look at what the GATT requires, this paper will also examine certain reforms China has made to its economic system and the history of China's GATT application. The issue of whether China should be allowed to "resume" its GATT seat or if a new accession is required shall be analyzed. Next, the demands made by the CPs, in particular the United States of America, shall be outlined. Last, a tentative timetable for China's entering the GATT will be proposed.

II. China's Long March to GATT

In April 1980, China resumed its place in the UN Interim Commission for the International Trade Organization (ICITO). This was the body set up supposedly as a precursor to the International Trade Organisation (ITO) in 1944. The ITO was never created, but the ICITO remained with its sole function being to appoint the GATT secretariat. China was entitled to resume its seat on the basis of the 1971 United Nations' decision to recognize the PRC government.[6] By resuming ICITO participation, China signalled its interest in the GATT. In November 1982, China was allowed to be an observer at the GATT ministerial level meeting.

On 15 December 1983, China joined the GATT Multifibre Arrangement (MFA). Participation in the MFA was no doubt good for China in that it gave officials experience in an international trade area associated with the GATT. However, compliance with the MFA is certainly not a good measure of readiness for the GATT. The MFA is in fact the antithesis of GATT rules as it sets up quantitative restrictions and has led to significant market distortions. One of the major achievements of the Uruguay Round was to agree to phase out the MFA.

The Ministry of Foreign Economic Relations and Trade (MOFERT)[7] was given responsibility for developing the GATT relationship. In September 1984, the State Council approved foreign trade reforms proposed by MOFERT. "The foreign trade planning system

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5 "Decision of the CPC Central Committee on Issues Concerning the Establishment of a Socialist Market Economic Structure (14 November 1993)", *China Economic News*, Supplement No. 12, 29 November 1994.

6 U.N. General Assembly Resolution 2758 (XXVI) on Restoration of the Lawful Right of the People's Republic of China in the United Nations.

7 Since 1993, MOFERT has been known as the Ministry of Foreign Trade and Economic Co-operation (MOFTEC).

was shifted toward greater reliance on guidance plans and less on command plans."[8] Other reforms further decentralized control of the trade regime. However, "China's foreign trade in the mid-1980s nevertheless remained subject to multiple layers of control."[9]

In December 1984, China requested and was granted permanent observer status in the GATT council and subordinate bodies. There were high level visits to China from the GATT in the mid-1980s culminating in a January 1986 visit by the then GATT Director-General Arthur Dunkel.

In February 1987, China submitted a memorandum on its foreign trade regime to the GATT.[10] Three months later, in May 1987, the GATT established a working party for China's accession. The working party would examine China's trade regime and negotiate a protocol of accession setting out China's rights and obligations under the GATT.

In 1988 the economy of China was overheating and by mid-1988 the government imposed a slowdown. The events of June 1989 led to withdrawal and withholding of foreign capital. Reform was put on hold while the leadership considered what to do. The international political fallout after June 1989 also placed China's GATT application temporarily on hold.

In early 1992, after a period of three and a half years of retrenchment, the PRC announced a return to market-oriented reforms. In January 1992, Deng Xiaoping signalled the renewed drive for reform with his trip to Guangdong in southern China, the most market-oriented of all provinces in China. At its 14th National Congress in October 1992, the Communist Party proclaimed that the creation of a "socialist market economy" was the goal of economic reforms.[11]

In 1992, China's economy grew at a rapid rate of 12.8 percent real GNP.[12] Imports from the U.S. rose by more than 15 percent but what caused concern for the U.S. was that exports to the U.S. from China grew by over 40 percent in 1992.[13] With China's exports growing rapidly and its obvious barriers to imports, it was not surprising that China's GATT application was taking a long time. The renewed reforms certainly made up lost ground but the continuing negotiations in the working party seemed to indicate that the CPs had become less certain of the stability of the reforms.

The question is whether China has now made sufficient progress in economic liberalization for it to join the GATT. China has made progress but there are significant areas where reforms have come slowly. The one-sided nature of the reforms has also caused concern: "[w]hile China's export regime has undergone a remarkable transformation over the past decade, turning China into one of the world's most formidable export engines, China's import regime still remains the creature of central planners and state bureaucracies."[14]

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8 Harold K. Jacobson & Michel Oksenberg, *China's Participation in the IMF, the World Bank, and GATT: Toward a Global Economic Order* (Ann Arbor: The University of Michigan Press, 1990), p. 86.

9 Ibid, p. 87.

10 GATT Doc. L/6125, 18 February 1987.

11 This decision was reiterated more recently by the Central Committee, see note 5 above.

12 USTR Trade Barrier Report on China, United States Information Service, 2 April 1993.

13 Ibid.

14 Statement of Ambassador Charlene Barchefsky, Deputy United States Trade Representative on Trade Policy Toward China, before the House Ways and Means Subcommittee on Trade, 24 February 1994.

III. The GATT: An Overview

To aid the discussion of China's position relative to the GATT requirements, a brief overview of certain GATT Articles is necessary:

Article I contains the general *most-favoured-nation* (MFN) provision under which a contracting party that grants a preference to another country must grant the same to all CPs.

Article II provides for the *tariff concessions* and MFN with regard to such tariff concessions. Article II also provides that once a concession is made the tariff cannot be raised and is said to be "bound". Tariff reductions and bindings have acted as the primary market-opening measure in the GATT. Tariff reductions are negotiated as part of the accession process on a reciprocal basis with the CPs. The agreed tariff reductions are attached to the acceding party's Protocol of accession and are referred to as the schedule of commitments. Further reductions have been negotiated through the successive Multilateral Trade Negotiating Rounds, the Uruguay Round being the latest. New GATT members therefore benefit from the earlier negotiations because of MFN. New members will of course have to negotiate an "entrance fee" in return for these benefits. Reciprocity can be seen as a concept in Article II and also in the **Preamble** to the GATT.[15]

Article III provides for *national treatment*: "The products of . . . any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin . . . ."[16]

Thus one can see that MFN, reciprocity, and national treatment are fundamental concepts to the GATT. MFN and national treatment can be seen as aspects of the over-arching GATT principle of *non-discrimination.*

Transparency is also one of the fundamental GATT principles. Article X requires transparency -- i.e. the publication of laws, regulations, judicial decisions and administrative rulings pertaining to trade which shall be published promptly and be made readily available.

Thus the three cornerstones of the GATT are **non-discrimination**, **reciprocity**, and **transparency**.

Article XVII on *state trading enterprises* is also important with regard to China. Article XVII states that such enterprises shall make purchases or sales on the basis of non-discrimination and shall make such purchases or sales solely in accordance with commercial considerations. There are requirements for notification to the GATT of state trading activities and adherence to non-discrimination. There is also the requirement that state monopolies do not exercise their powers over imported goods in such a way as to create greater protectionism than is afforded by tariffs.[17]

Certain problems with Article XVII have been identified:[18] First, the emphasis in the GATT is on tariff reduction as the means for opening markets and this is not effective with

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[15] The GATT Preamble states: "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, . . . developing the full use of the resources of the world and expanding the production and exchange of goods . . ..Being desirous of contributing to these objectives by entering into **reciprocal** and **mutually advantageous** arrangements . . . ." (emphasis added)

[16] GATT Article III: 4.

[17] GATT Article II: 4.

[18] Paul D. McKenzie, "China's Application to the GATT: State Trading and the Problem of Market Access" (1990) 24 (No. 5) JWT 133, pp. 138-139.

regard to NMEs.[19] Where tariff reductions are ineffective it is difficult to verify compliance with non-discrimination. Second, the definition of "state trading" is vague and therefore it may be possible for a state to have certain enterprises excluded. Third, Article XVII focuses on state trading enterprises involved in imports and exports. This is too narrow a focus for a NME where state actors are pervasive.

The Uruguay negotiators recognized the deficiencies of Article XVII and have, to a certain degree, overcome them. The new provision increases surveillance of the activities of state trading enterprises through strengthened notification and review procedures.[20] The Uruguay agreement deals with the first criticism of Article XVII but does not address the latter two. In fact, the persistence of an entrenched bureaucracy and partial nature of reform prevents decisions being made on purely commercial grounds. While it is true that Article XVII does not address this problem, this is really a reflection of the underlying market-economy orientation of the GATT. Perhaps the better way to address the issue is for the NME to change its system to better conform with the GATT rather than trying to come up with new rules to better suit the NME.

Article XXXIII is the *accession* provision for new parties to the GATT. It sets out that accession shall be done on terms to be agreed between the applicant and the CPs. A two-thirds majority of the CPs is necessary for acceptance of a new member. A point to be discussed concerns China's insistence that it is "resuming" its seat and that therefore Article XXXIII accession is not appropriate.

Article XXXV provides for *non-application* of the agreement between contracting parties. If at the time of accession a CP does not wish to apply the GATT between itself and the newly acceding party, it may invoke Article XXXV. The newly acceding party also has the right to invoke Article XXXV. Therefore, if China were to accede as a new member to the GATT, then any other CPs, or China, may invoke the non-application article to prevent the GATT from applying between them. Article XXXV is linked to Article XXXIII in that it can only be invoked at the time of a new contracting party's accession.

Originally, under the GATT 1947, only CPs who had not entered into tariff negotiations with one another could invoke Article XXXV.[21] However the new Uruguay Agreement allows a contracting party or a newly acceding country to invoke Article XXXV even after entering into tariff negotiations. Up until now, countries such as the U.S. have refrained from entering into tariff negotiations with China because they want to preserve the right to invoke Article XXXV. This has likely hindered the pace of negotiations generally and therefore the new provision should be of benefit to all parties concerned. Whether Article XXXV can be applied to China at all is somewhat controversial in itself.

The non-application provision is carried on in the Agreement Establishing the World Trade Organisation under Article XIII of that document.

A. The Uruguay Round Results

The Uruguay Round began on September 20 1986 and concluded on December 15, 1993. The CPs actually signed the Final Act in April 1994.

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[19] Please see pp. 55-56 below.

[20] "Understanding on the Interpretation of Article XVII of the GATT 1994", MTN/FA II-A1A-1(b).

[21] "Understanding on the Interpretation of Article XXXV of the GATT 1947", MTN/FA II-A1A-1(g).

Under the Uruguay Agreement the GATT is now the "GATT 1994" and the pre-existing agreement is the "GATT 1947". The GATT 1947 is an integral part of the GATT 1994 except as modified.[22] One of the most important features of the Uruguay Agreement is the creation of the World Trade Organization (WTO). The GATT 1994, which is integral to the WTO, and the GATT 1947 are legally distinct.[23] Therefore, CPs to the GATT 1947 must sign the WTO agreement before it becomes effective for them. Therefore the "GATT [1947] and the WTO are likely to co-exist for a period of time that is presently unforeseeable . . . ."[24]

China is trying to accede to the GATT 1947. Under the GATT 1994, CPs whose schedules of commitments are annexed to the GATT 1994 shall be original members of the WTO.[25] As a participant in the Uruguay Round, China *must*, under the terms of the Uruguay Final Act, accede to the GATT 1947 before accepting the WTO Agreement.[26]

If a country is not an original member of the WTO, then it must accede under a procedure identical to accession under the GATT 1947. Article XII of the WTO Agreement mirrors Article XXXIII (accession). Article XIII of the WTO Agreement is the non-application provision. Article XIII reflects the changes made to Article XXXV of the GATT 1947 in the Uruguay Agreement.[27]

Besides the establishment of the WTO, the Uruguay Round is significant for expanding the GATT in terms of new areas of trade. It also has resulted in a strengthening of GATT discipline.

The Round has gone further than any previous negotiations to extend and strengthen the rule of law in international trade, both by bringing GATT principles to apply in areas where they have been lacking, and by strengthening the existing rules, especially by ensuring their application through a more effective dispute settlement system.[28]

While all of the Uruguay results will have varying degrees of impact on China's accession, I shall highlight three GATT 1994 agreements under which China must make changes.

1. Agreement on Trade-Related Investment Measures[29] (TRIMs)

No CPs may apply any TRIMs inconsistent with GATT Articles III (non-discrimination) and XI (quantitative restrictions).[30] Transparency is mandated[31]: there must be notification of all non-conforming TRIMs and elimination within two years for developed countries, five years for developing countries, and seven years for the least developed countries.[32] An illustrative list is included in the Annex to the TRIMs Agreement. The prohibited measures

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22 I shall continue the standard practice of referring to simply the "GATT" when discussing the agreement in general and specify the "GATT 1994" and the "GATT 1947" where relevant.

23 "Agreement Establishing the World Trade Organization", MTN/FA II, Art. II: 23.

24 *Focus* (GATT Newsletter) no. 104, December 1993, p. 3.

25 See note 21 above, Article XI.

26 "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations", MTN/FA I Article 5.

27 See note 20 above, and accompanying text.

28 See note 23 above, p. 2.

29 MTN/FA II-A1A-7.

30 Ibid, Article 2.

31 Ibid, Article 6.

32 Ibid, Article 5: 2.

in the list include, among other things, limits on access to foreign exchange.[33] Although China has moved to abolish some restrictions it also has added others, particularly on consumer items: "[T]he government would strengthen control over imports of 18 products on the quota list, including cars, motorcycles, video recorders, computers and air conditioners."[34] These sorts of actions are in violation of the TRIMs agreement.

2. Agreement on Trade-Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods[35] (TRIPs)

TRIPs is a comprehensive intellectual property regime. The TRIPs Agreement is divided into seven parts. Part I is the general provisions section. National treatment[36] and MFN[37] are central to TRIPs. Part II identifies each IP right.

Part III deals with enforcement and is quite detailed, with twenty Articles. Included in Part III is the demand for members to provide criminal sanctions for certain violations and the seizure, forfeiture and destruction of infringing goods in appropriate cases.[38] Given the experience of the U.S. with its bilateral intellectual property agreement with China (see discussion below) one can see why the enforcement provisions in the GATT 1994 are quite specific.

The purpose of Part IV is to ensure procedural fairness within the domestic IP schemes of member countries. Part V is for dispute prevention and settlement. Included here is the transparency requirement.[39]

Part VI deals with transitional arrangements pending full implementation of TRIPs by a member. Interestingly there are separate provisions for developing countries[40] and for WTO members "in the process of transformation from a centrally-planned into a market, free-enterprise economy".[41] Both developing countries and "economies in transition" are allowed a five-year delay for implementation.

Part VII primarily concerns the newly created Council for TRIPs which will monitor compliance and have dispute-settlement authority.

3. General Agreement on Trade in Services[42] (GATS)

The GATS has six parts: Part I sets out the scope and definition of trade in services. The second is a framework agreement that contains basic obligations applicable to all members, including MFN[43] and Transparency.[44] National treatment is included under Part III, Specific Commitments, and is therefore not applicable to all services. The GATT has never dealt with

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33 Ibid, Annex Article 2(b)

34 "China's Shifting Wall of Trade: Beijing lowers some import barriers, adds others." *South China Morning Post*, 3 January 1994.

35 MTN/FA II-A1C.

36 Ibid, Article 3.

37 Ibid, Article 4.

38 Ibid, Article 61.

39 Ibid, Article 63.

40 Ibid, Article 65: 2.

41 Ibid, Article 65: 3.

42 MTN/FA II-A1B.

43 Ibid, Article II.

44 Ibid, Article III.

services before and therefore the GATS makes allowances for phase-in periods on a negotiated basis.[45] Part IV in fact deals with the Progressive Liberalization of trade in services. Part IV envisages negotiations set at five-year intervals whereby members will progressively remove barriers in a manner similar to the successive GATT rounds of multilateral trade negotiations. The difference is that these GATS rounds will be at set intervals and a new Council for Trade in Services will be set up to monitor progress.

Many GATT CPs have markets that are difficult to enter in the service trade. Therefore China, once it accedes, will not be alone in wanting to open their market slowly. The GATs recognizes the fact that countries will have particular requirements and that is why agreements will be negotiated rather than having set time limits. This is consistent with the GATT approach to reducing tariff barriers to goods. Nevertheless, all WTO members must agree to GATS and they will have to make regular and specific commitments to open markets. Clearly, China cannot continue with its heavily regulated market under GATS. Whether a "socialist market economy" can accommodate such changes remains to be seen as China has so far introduced very little change in this sector.

IV. Why China Wants to Join the GATT

China sees a number of benefits from full participation in the GATT. First, China has already joined the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank). By joining the GATT, China would be a member of all three pillars of the world economic structure. China's participation in the GATT would give it international legitimacy as a major player in the global economy. Second, becoming a GATT CP would give China greater defence against possible protectionist measures than under bilateral negotiations. China would get access to the GATT dispute resolution mechanisms. China would also be able to exert influence within the GATT. Third, joining the GATT would entitle China to unconditional MFN status. China, as a GATT CP, would also be eligible for the Generalized System of Preferences (GSP)[46] benefits from the U.S. because "U.S. law requires that communist countries adhere to GATT principles and be members of IMF to receive GSP treatment."[47] Finally, from the point of view of reformers in China, the GATT "would involve China in a series of international obligations that could be used to reinforce the reforms and to make them irreversible."[48]

There would be some difficulties for China as a GATT CP. China would have to allow scrutiny of its trade system and make available formerly internal (*neibu*) documents. China would of course have to make concessions to reduce its protectionist practices. The way around some of these difficulties, in China's view, is to join the GATT as a developing country.

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45 Ibid, Article XVI.

46 Please see p. 58 below.

47 See note 8 above, p. 93.

48 Ibid.

V. *PRC Demands*

In the Working Party negotiations China has raised five issues:[49]

1. China shall resume its seat; this will not be a new accession.
2. Reduction in its tariff schedules -- tariff concessions -- should provide the basis for the negotiations.
3. China should be regarded as a developing country.
4. As a CP to the GATT, China should receive MFN from the United States.
5. China should receive benefits under the General System of Preferences of the United States.

1. Accession or Resumption: Does it Matter?

An issue that arises in every discussion on China's future in the GATT is the matter of China's claim for "resumption" of the GATT seat originally held by the Republic of China (Taiwan). While there have been suggestions that this is a non-issue and a matter of semantics only, it may pose some legal difficulties and therefore warrants examination.

The Chiang Kai-Shek government was a party to the original GATT negotiations and one of the 22 original CPs. After the communist takeover of the mainland the Nationalist government in Taiwan found that it could not maintain its GATT membership since it had no method of carrying out its obligations. Therefore, on 6 March 1950, the Republic of China withdrew from the GATT. The PRC government never recognized the validity of this withdrawal. In November 1950, Czechoslovakia, a GATT contracting party, questioned the validity of the withdrawal also. However, the PRC did nothing to clarify its position on the matter at the time and the matter was dropped.

In 1965, Taiwan requested observer status in the GATT. By this time a number of countries had recognized the Beijing government as the legitimate government of China and resisted.[50] The GATT Chairman avoided the issue by ruling that mere observer status did not prejudice the position of the CPs with regard to recognition of Taiwan. Taiwan was therefore allowed to hold observer status until 1971.

In 1971, the United Nations voted to restore to the PRC the U.N. seat then held by Taiwan.[51] The GATT CPs decided no longer to accord Taiwan observer status. One writer has commented that by this move the GATT recognized that the PRC government has been the legitimate holder of the GATT membership since 1949.[52] However, this argument overlooks the fact that Taiwan was only allowed in as an observer on the express condition that the decision would not prejudice the position of the CPs.

Chung-Chou Li blames the "particularly complicated contractual nature of GATT obligations" as the primary reason for China not immediately pursuing the issue of GATT membership in 1971. This is hardly the case. China, in the middle of the Cultural Revolution, was neither willing nor ready to undertake GATT obligations.

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[49] Ibid, p. 100.

[50] Those countries against Taiwan's request were: Cuba, Czechoslovakia, Denmark, France, Indonesia, Netherlands, Norway, Pakistan, Poland, United Arab Republic (Egypt), United Kingdom and Yugoslavia.

[51] See note 7 above.

[52] Chung-Chou Li, "Resumption of China's GATT Membership" (1987) 21 (No. 4) JWT 25, pp 25-48

What is true is that China has taken a step-by-step approach to GATT membership since the early 1980s.

The debate over the significance of China's resumption versus accession is indicative of what Kenneth Dam calls "the tension that exists in the GATT between the poles of what may be called 'legalism' and 'pragmatism'."[53] Those who argue that it does not really matter what term is used for China's joining the GATT so long as China agrees to new terms would subscribe to pragmatism. One commentator on the subject who does not take this view and who fits Dam's model of legalism is Ya Qin.[54]

Qin does acknowledge that under international law the recognition of the PRC government by the U.N. in 1971 is valid retroactively to 1 October 1949 when the communists took power. Qin says that while the PRC government had authority and acts by the Nationalists were invalid, the fact that the PRC chose to do nothing regarding the GATT for so long is significant. The issue is whether the GATT could be considered in "suspension" for so long with regard to China. Qin notes that the GATT itself "contains no provision regarding suspension of the entire Agreement between particular contracting parties."[55]

Qin also takes issue with the idea that the terms "resumption" and "accession" in China's agreement will have no significance. Qin notes that as an international treaty the GATT must be agreed upon by all parties for it to be binding among them. The fact is that many countries acceded during the period when China was not, for all intents and purposes, a member. If China were to "resume" the seat vacated by Taiwan these countries would not ever have had a chance to invoke Article XXXV. This would clearly infringe sovereign rights and violate norms of international law -- a state cannot be bound against its will.

I believe that Qin makes valid points but these are issues that can be overcome through the accession protocol. China has placed too much national pride on the issue of resumption and the CPs have not made the issue a sticking point. Qin suggests that to satisfy national pride the Chinese government could withdraw from the original GATT and then accede again. This is a possibility if the issue becomes a stumbling block. What will likely happen is that China will accede to the GATT as any other country, except for some sort of official recognition by the other CPs that the Nationalist withdrawal was unlawful or words to that effect. These may all become moot points in any case because all CPs will sign the new WTO Agreement which is legally distinct from the GATT 1947. This paper will therefore not delve any further into this issue.

2. *Tariff Concessions as the Basis for Accession*

In market economies, the reduction of import tariffs leads to lower prices and increased competitiveness of the import goods. However, in a NME the reduction of tariffs will not have such a cause and effect relationship. In market economies, relative prices guide export and import decisions of private enterprises. In NMEs, price has little influence since supply and demand are administratively determined. "Tariffs, which influence prices, likewise have little influence over the quantity, source, and composition of imports."[56] The economy runs

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53 Kenneth Dam, *The GATT: Law and International Economic Organization* (The University of Chicago Press, 1970), p. 3.

54 Ya Qin, "Accession Instead of Resumption" (1993) 27 (No. 2) JWT, pp. 77-98.

55 Ibid, p. 87.

56 Leah A. Haus, *Globalizing the GATT: The Soviet Union's Successor States, Eastern Europe, and the International Trading System* (Washington D.C. : The Brookings Institution, 1992), p. 22.

according to the state plan. Jacobson and Oksenberg note that the effectiveness of tariff reduction in NMEs is lessened where:

(1) The level of imports is determined, even in part, by a state plan;
(2) Foreign trade corporations are interposed between the foreign seller and the domestic buyer;
(3) There are substantial licensing requirements;
(4) The exchange rate is set administratively; and
(5) Access to foreign exchange is regulated.[57]

All of these points are true with regard to the PRC. China has argued that the tariff concessions it makes in its protocol of accession should be the only terms for its accession. Clearly, tariff reductions alone are not enough to bring China's state-controlled trade regime into line with GATT requirements.

3. Developing Country Status

Developing countries are given special treatment under the GATT. The less developed countries did not get everything they wanted under the original GATT in the form of a comprehensive provision. What they did get though was Article XVIII.[58] Diana Tussie, in her discussion of the developing countries and the GATT, gives this description of Article XVIII:

> The provisions permitted a country to deviate from the general provisions on bound tariff concessions or the prohibitions on quantitative restrictions when this was necessary to pursue their development objectives, notably for the establishment of infant industries or to protect their balance of payments.[59]

While Article XVIII allowed for certain deviations it did not absolve developing countries of initial GATT commitments. In 1964, the CPs agreed to a new section in the GATT to address the concerns of the developing countries. Thus, Part IV (Trade and Development) was created. Part IV allows exemptions from GATT principles for the benefit of the developing countries. Part IV abolishes the reciprocity obligation.[60]

China has called itself a "developing socialist economy"[61]. China expects to get all of the special treatment accorded to developing countries under various GATT rules.[62] Waiving the reciprocity obligation was a primary concern because developing countries see reciprocity as forcing them to open markets sooner than they would like. As one report on the concerns of developing countries notes: "over the years none of the ideas which underlies

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57 See note 8 above, p. 89.
58 GATT 1947, Article XVIII, governmental assistance to economic development.
59 Diana Tussie, *The Less Developed Countries and the World Trading System: A Challenge to the GATT* (London: Francis Pinter, 1987), p. 18.
60 Article XXXVI: 8
61 See note 11 above.
62 See note 8 above, p. 91.

the present-day trading system has been regarded by developing countries as seemingly more contrary to their interests than reciprocity."[63]

The trouble with China joining as a developing country is that it is unlike any of the developing countries in the GATT in terms of the size of its economy. Interestingly enough the developing countries in the GATT have remained relatively silent on China's accession even though China will compete directly with their exports. Jacobson and Oksenberg say that there are concerns among these countries that China's accession as a developing country may set precedents such as establishing the concept of "graduation" from developing country status. For example, on 2 January 1989, Hong Kong, South Korea, Singapore and Taiwan were "graduated" from the U.S. GSP benefits.

The countries now designated as developing countries also do not want a standard definition of what constitutes a "developing country" to be devised, preferring it be determined by self-attribution. The CPs negotiating China's accession may well turn a critical eye to China's claim for all the benefits of a developing country. Since China is already a large exporter of goods and southern China is set to become the next "tiger" in Asia, this problem of definition could be a sticking point.

China exports far more than it imports. Since the major benefit of developing country status in the GATT is waiver of reciprocity the granting of such status to China could exacerbate the situation. CPs like the United States want reciprocity to expand their own export markets. In China's case, the U.S. sees reciprocity as a key element. Lee Sands and Deborah Lehr of the United States Trade Representative's Office (USTR), writing on their own behalf, have noted "the United States is far from achieving the level of access to the China market that China enjoys in the United States."[64] The difficulties of gaining access to China's domestic market outside of the GATT means that the U.S sees the GATT negotiations as a powerful market-opening mechanism.

4. Most-Favoured-Nation Status and the U.S.

The question of automatic MFN status arises with China's accession. The U.S. government position is that it will have the right to invoke Article XXXV: "[T]he United States invokes this clause with respect to all GATT Contracting Parties whose MFN status, under U.S. trade law, is conditioned by the need for an annual review of their emigration practices; they require a presidential waiver according to Section 402 of the 1974 Trade Act."[65] Section 402 would also apply for the WTO accession procedures.

5. The U.S. Generalized System of Preferences

Discussions on allowing tariff preferences to developing countries began in the United Nations Conference on Trade and Development (UNCTAD) in 1964. These tariff preferences would contravene GATT rules. In 1971, the GATT granted authority for such preferences. In

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63 John Whalley, (co-ordinator), *The Uruguay Round and Beyond: The Final Report from the Ford Foundation Supported Project on Developing Countries and the Global Trading System* (Ann Arbor: The University of Michigan Press, 1989), p. 25.

64 Lee Sands, & Deborah Lehr, "Expanding Trade and Opening Markets in China" (July-August 1993) *China Business Review*, p. 10.

65 Ibid.

1976, the United States brought the GSP benefits into U.S. law.[66] Nearly 3000 tariff categories are eligible for duty-free treatment. Many goods produced in China would be eligible for GSP (though significantly, textiles and footwear are not) and GSP would benefit China.

Under the U.S. GSP law, communist countries can only get benefits if they comply with certain requirements. As mentioned, membership in the IMF and the GATT is required for eligibility. A country must also be receiving MFN status from the U.S. which (see above) will also remain problematic for China. There are a number of other restrictions in the GSP rules that reflect other U.S. interests (e.g. labour standards). While China will become eligible for the GSP it is still not guaranteed because the system is discretionary, requiring Presidential approval. It will be surprising if China does get GSP in the face of many opposing domestic interests in the U.S.

VI. Demands of the Contracting Parties

Some writers have focused on changes needed in the GATT for it to deal with non-market economies (NMEs). The examples of Poland, Romania and Hungary are usually cited to prove that accommodation is possible. There are unique difficulties in dealing with the issue of NME accession. Market access is a primary goal of the CPs when negotiating an accession protocol. The usual method is to have tariff reductions which, when reduced, can never be raised again (these are referred to as tariff "bindings").

Tariff concessions are the "entrance fee" paid by the newly-acceding country. However, as stated above, such concessions are not appropriate for NMEs: "[s]ince tariffs have little or no influence over import decisions, other GATT members would not be assured of any increase in export opportunities."[67] The issue then is what conditions are appropriate if tariffs are not adequate. Two measures that have been used in past accessions of NMEs are import commitments and selective safeguards. The former is an obligation imposed on the newly-acceding NME to increase its imports by a set percentage over a designated period of time. Selective safeguards are similar to countervailing measures -- allowing a CP to impose duties on goods sold at a lower, subsidized, price if such goods are causing or threatening to cause substantial harm to a domestic industry. The GATT allows countervailing measures but these are imposed on a non-discriminatory basis. What selective safeguards do is to allow CPs to target only the goods of the NME in question.

Poland acceded to the GATT in 1967 and provides some interesting parallels to the process China is undergoing. In the mid-1950s, Poland made inquiries about joining the GATT. In October 1957, it was granted observer status. It applied for accession in 1959 but was denied, but Poland was encouraged to continue the dialogue: "[t]he West adopted a supportive approach in order to encourage the political changes that were occurring in Poland."[68] Poland was granted "associate membership" in the meantime and allowed to participate in the GATT sessions and subsidiary bodies, as China is today.

Poland applied to participate in the Kennedy Round in 1963. The U.S. supported the application for strategic political reasons -- the policy of "differentiation" of the Eastern Bloc.

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[66] Trade Act of 1974, Title V; 19 U.S.C.A. ss 2461-65.

[67] Ibid.

[68] See note 8 above, pp. 26-27.

European opposition kept Poland out however until 1965. Finally, accession talks were made in earnest in 1967. Because of Poland's non-market economy the CPs demanded special terms be included in the Polish accession protocol. Quantitative restrictions were demanded by the European Community. A special selective safeguard mechanism was drafted by the U.S. Additionally, a provision for Poland to guarantee an annual increase of imports by 7 percent was included. All of these measures were included into Poland's protocol and Poland entered the GATT.

Romania also acceded to the GATT with conditions similar to Poland's in its protocol.

Hungary was an exceptional NME in that Hungarian negotiators persuaded the CPs to let them accede on the basis of tariff reductions only. The subsequent experience of the CPs with Hungary was not so good and "[m]any GATT observers felt that it was a precedent that should not be repeated."[69]

A. The U.S. - China 1992 MOUs

In 1992, the United States and China signed two separate memorandums of understanding (MOUs). While the MOUs addressed particular concerns of the U.S. and were the result of threatened trade sanctions, they also mirrored concerns of the GATT working party on China.

On 17 January 1992, the U.S. and China signed the memorandum of understanding on intellectual property rights.[70] The MOU mandated changes to China's intellectual property regime. China was required to join certain international conventions and to make amendments to its domestic legislation. China did comply with the MOU by joining the Berne Convention in October 1992. China amended its patent legislation also to conform with its MOU commitments.[71] While the MOU was quite specific on what areas of intellectual property were to be protected, it was not specific about remedies for violations. The MOU merely called upon the parties to provide "effective procedures and remedies".[72] The intellectual property MOU was prompted by the threat of U.S. "Section 301" sanctions. China agreed to strengthen protection of intellectual property rights and the U.S. dropped the threat of 301 action. While the IP MOU was successful in having China amend its laws, it did not produce satisfactory results in enforcement.

While China's laws are now up to international standards, they have been to a large degree meaningless due to lack of enforcement. In 1992, the U.S. Customs Service seized US$ 120 million in pirated goods coming from China.[73] Pirated software and compact discs are two of the most blatant examples of how little protection the Chinese laws afford to foreign rights holders. There are said to be about 15 CD plants in China producing some 52 million counterfeit discs.[74] The USTR calls this "the most egregious example of failed IPR enforcement" and has placed China on the Special 301 Priority Watch List in November 1993 because of it.[75]

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69 Ibid, p. 90.

70 *Memorandum of Understanding Between the Government of the United States of America and the Government of the People's Republic of China on the Protection of Intellectual Property.*

71 Standing Committee of the National People's Congress Amendment of the Patent Law of the People's Republic of China, promulgated 4 September 1992; effective 1 January 1993.

72 See note 70 above, Article 5.

73 "Pirates in China", *South China Morning Post*, 22 February 1994, Business p. 3.

74 Ibid.

75 See note 15 above.

The second MOU was on market access.[76] Under the Market Access MOU, the U.S., in return for promises made by China, agreed to "staunchly support" China's GATT bid by helping to draft a protocol acceptable to the CPs. Since the U.S. is the chief negotiator in the China Working Party, an "acceptable protocol" is one acceptable first and foremost to the U.S. Government. The Market Access MOU and the GATT Working Party's demands are closely connected. A 1993 U.S. Government communique[77] outlines what issues the WP is looking at and what the U.S. wants included in China's accession protocol:

B. Questions Put to China in the GATT Working Party

China has had to answer more than 2,000 questions put to it by members of the Working Party. The questions dealt with five issues in general:

(1) The scope and nature of China's non-tariff import protection;
(2) The role of foreign trade corporations and other large state trading entities;
(3) China's request that agriculture be exempted from its GATT obligations claiming that because of its developing nation status its agriculture needs extra protection;
(4) The scope and direction of China's price planning and foreign trade reforms; and
(5) Foreign exchange requirements. Here, the CPs want to make sure that exchange rates cannot be manipulated to frustrate the intent of the GATT.[78]

The U.S. Government has developed a position on what is needed for China to accede that is based upon five points developed in 1989:

(1) Uniform application of trade measures;
(2) Transparency;
(3) Elimination of non-tariff barriers;
(4) Price and trade decision-making reform;
(5) Safeguards.[79]

Uniform application refers to the uncertainty surrounding the amount of, for example, customs duty payable. This uncertainty arises because local officials are willing to cut deals on occasion. U.S. companies are particularly sensitive to this issue because under U.S. law they are liable if they engage in corrupt practices (i.e. pay bribes).[80]

Transparency of trade regulations and in the administration of trade barriers has obviously been a primary concern of the GATT in general.

Non-tariff barriers in China include such measures as border charges and taxes not included into the tariff system. The customs regime and system of import and export taxes are used by China as a tool to regulate foreign trade. As Moser and Zee state:

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[76] *Memorandum of Understanding Between the Government of the United States of America and the Government of the People's Republic of China Concerning Market Access*, 10 October 1992.

[77] *China and the GATT: The U.S. Perspective*, Consulate General of the United States of America, Hong Kong, 25 March 1993.

[78] Ibid.

[79] Ibid.

[80] Foreign Corrupt Practices Act, 15 U.S.C. s 78.

> [D]uties and taxes are imposed at relatively low rates, or exempted or reduced by special statute, for goods which China requires. Conversely, higher tax rates are levied on goods whose import or export are discouraged. In addition, trade is further regulated by the prohibition of imports and exports of certain categories of goods and by a system of import and export licensing.[81]

Price and decision-making reforms refer to the shift to a market-economy where price, rather than administrative decision, determines purchasing.

By "safeguards" what is being referred to here is not just the usual GATT measures but rather selective safeguards as have been used in previous NME accessions. Of the five points listed above, "safeguards" is the one that China most strongly resists. The other demands are points upon which China can argue are being implemented and which may prove to have some flexibility once China is in the GATT. Agreeing to safeguards however gives the CPs an external lever against China and the right to unilateral action.

VII. Timetable for China's Membership

The U.S. Government in March 1993 said that the CPs still had questions and that they could not predict when China would accede.[82]

A year later, the GATT Secretariat indicated that it wants progress on China's application. In March 1994, the GATT Secretariat laid down a timetable for certain procedures regarding China. The timetable requires that:

(1) All requests from interested parties for further clarification on China's national trading environment be submitted by the end of March 1994.
(2) A draft protocol is to be submitted by mid-April 1994 laying down the precise requirements for China to join the WTO.
(3) China must be ready by the end of April 1994 to provide answers to the remaining questions raised by the Working Party.[83]

Questions still to be answered include questions about tax reforms, foreign exchange rules reforms, statistics on imports and exports from the Special Economic Zones as a proportion of total imports and exports of China, and questions on China's agricultural development.[84]

China has made changes to its laws, for example in intellectual property, but the economic system as a whole is far from conforming with the world trade system. In this paper I have highlighted aspects of the GATT which China cannot conform with at this time. The Uruguay Agreement brings in further market opening mechanisms for which China is not ready. In China's favour is the fact that many provisions do have a phase-in period. The

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81 Michael J. Moser & Winston K. Zee, *China Tax Guide* (Hong Kong: Oxford University Press, 2nd edition), p. 119.

82 See note 77 above, in which it stated: "[W]e should note that the acceding party drives the speed of the accession process. It is thus up to the Chinese to accept the commitments and provide the information necessary to complete the process."

83 "GATT Gets Tough Over China", *South China Morning Post,* 19 March 1994, Business, p. 3.

84 Ibid.

question remains however as to how committed to reform China is. China has engaged in a stop-and-go approach to reform and contradictory signals continue to flow. A recent example is the revival of price controls by municipal authorities under State Council orders. In Beijing in March 1994, the authorities imposed "temporary" ceilings on prices of more than 100 items from soy sauce to home appliances.[85]

Regardless of the on and off reforms in China it is now obvious that there is support from within the GATT to see China join relatively soon. The U.S. appears to be the only major party holding back. The EU have indicated their support for China[86], as has the GATT Secretariat.[87] In the end, the decision to allow China to accede will owe something to politics as well as economics. There may be a feeling among certain CPs, as there was with Poland, that rewarding the efforts of reformers by allowing accession will stymie more conservative domestic interests. There also seems to be a desire to see everyone come into the WTO as soon as possible. Therefore it is not possible to predict when China's accession will occur. It would be best if China's accession could be delayed at least two years, allowing further reforms to occur. However, for the reasons given above, I would not rule out the possibility of China's becoming a WTO member by the end of 1994 in spite of China's obvious difficulties with compliance even with bilateral accords of far less scope. China's hopes were raised by a document prepared for the 17th Working Party Session on China's accession. China called it a "draft protocol" and was expecting to have it approved as provisional entry terms.[88] But this was far too optimistic as a number of countries have called for greater clarification in vital areas such as financial services and foreign exchange controls.[89]

If China is allowed in early then the key to a beneficial GATT entry for China will be the protocol of accession. The CPs must ensure that there are adequate surveillance measures and appropriate safeguards included. As an important world economy, China should have a seat in the WTO. However, China should not take its seat until the CPs have proper assurances that from this position China will not exert its power to distort the world trade system that is poised to benefit the global economy as never before.

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85 "Business anger as Beijing expands price capping list", *Hong Kong Standard*, 29 March 1994, p. 1.

86 "EU seeks early GATT entry for mainland", *South China Morning Post*, 18 February 1994, Business p. 8.

87 "'Vital' that China joins WTO: Trade body chief terms move a priority", *South China Morning Post*, 2 March 1994, Business, p. 1.

88 "China Hopes For Progress in WTO Bid", *South China Morning Post*, 20 June 1994, Business, p. 10.

89 "Gaps in GATT Paper a blow for Beijing", *South China Morning Post*, 30 June 1994, Business, p. 5.

ARE RESTRICTIONS ON TOBACCO ADVERTISING CONSISTENT WITH THE HONG KONG BILL OF RIGHTS?

ANDREW CHEUNG SIU-FAI*

I. Introduction

Cigarettes can be regarded as one of the most widely advertised products all over the world. Strong medical evidence of the hazards of cigarette smoking started to emerge in 1950, and since then smoking has been recognised as "the largest, single, preventable cause of disease and premature death in the Western society".[1] Amid mounting evidence of the deleterious effects of smoking, tobacco companies have increased their activities to promote cigarettes by committing substantial resources to advertising and promotion, to finding new markets, and to fighting anti-smoking measures that would severely restrict their freedom to market tobacco products.[2] By means of advertising, tobacco companies attempt to allay anxieties about the hazards of smoking and to associate smoking with images of good health, youthful vigour, social and professional success, sexual attractiveness and other fanciful ideas. By sponsoring sporting, cultural, and artistic events, tobacco companies attempt to enhance the corporate image of the tobacco industry and to create a kind of subconscious positive association between smoking and exciting sports among the population. By giving away free samples, tobacco companies attempt to attract young nonsmokers to smoke in order to make up for the large numbers of people who have given up or have started to give up smoking in achieving a specified level of cigarette sales.

II. Measures Taken for the Control of Cigarette Advertising

In the mid 1970s, health authorities across the world adopted guidelines for the control of cigarette smoking. They included what was proposed by the International Union Against Cancer: the total ban of all forms of tobacco promotion; health warnings on cigarette packets; heavy taxation on tobacco products; restrictions on smoking opportunities; protection of the rights of non-smokers; and, public information programs.[3] Tobacco advertising was even banned in counties like Norway and Finland.[4] As far as the Hong Kong Government is concerned, it is the Government's policy to "discourage smoking, particularly amongst the young, and to educate the public on health risks involved".[5] The Government started to control cigarette advertising following the enactment of the Smoking (Public Health) Ordinance (Cap. 371) in 1982. Following extensive public consultation on the recommendations of the Hong Kong Council on Smoking and Health (COSH), the government enacted the Smoking (Public Health)(Amendment) Ordinance 1992 on 30 January 1992, which imposed stricter restrictions on tobacco advertising, the most drastic of which

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1 Noni Walker, "Tobacco Control Act 1990 (WA)" (1991) 21 U West Aust L Rev 391.

2 Michael Grossman & Philip Price, *Tobacco Smoking and the Law in Canada* (Toronto: Butterworths, 1992), p. 21.

3 See note 1 above, p. 392.

4 Ibid.

5 *Consultation Paper on Anti-Smoking Proposals*, August 1992 (Hong Kong: Government Printer), p.1.

is the prohibition of cigarette advertisements on radio and television broadcasts and in cinemas.[6] Proposals for further measures to control tobacco advertising were made in the Consultation Paper on Anti-Smoking Proposals in August 1992.[7] It is the purpose of this paper to discuss whether restrictions on tobacco advertising are consistent with the Hong Kong Bill of Rights, of which the relevant provision is Article 16 -- freedom of opinion and expression.

III. Is Tobacco Advertising a Form of Expression ?

"Freedom of Expression", as defined in Article 16(2) of the Hong Kong Bill of Rights (B.O.R.) includes: the "freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". The question is whether tobacco advertisements fall within the scope of expression protected by Article 16(2).

An advertisement contains messages which promote or attempt to entice a specific decision on the part of the recipient of the messages to agree to an economic exchange of money in return for goods or services.[8] Advertisements may be roughly classified into two categories: those that simply disclose information; and those that attempt to associate the products with favourable images lifestyles (the so-called lifestyle advertising to which many cigarette advertisements belong).

Lifestyle advertising in effect carries in itself a point of view about the nontangible benefits the advertised product brings. It does not merely announce that the particular product is available at a certain store for a given price, but it may also associate the product with certain kinds of satisfactions and qualities to a customer's life and image.[9]

According to classical theory, freedom of expression is valuable because it enables us to have a complete and accurate knowledge of the world through the exchange of information and ideas. However, in classical doctrine, there is a distinction between expression which appeals to reason, and manipulation, which distorts the natural reason of an individual and undermines the effort to discover truth.[10] That distinction provides the line which delineates the scope of freedom of expression. The classical doctrine also purely relies on the idea of language and words, which a speaker or writer may use to express his own thoughts and feelings in communicating with his listener or reader in the process of the discovery of truth, which remains the central concept of the justification and purpose of freedom of expression.[11]

In view of the changing social and political circumstances, there has been a shift in the justification of freedom of expression from the discovery of truth to self-expression and self-development, and the scope of the freedom's protection has been extended beyond spoken and written word to include different forms of "symbolic speech". The latter are certain

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6 Ibid, pp. 2-4.

7 Ibid, pp. 4-5.

8 Robert J. Sharpe, "Commercial Expression and the Charter" (1987) 37 UTLJ 229, p. 230.

9 Mathew L. Miller, "The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements" 85 CLR 632, pp. 650-1.

10 R. Moon, "Lifestyle Advertising and Classical Freedom of Expression Doctrine" (1991) 36 McGill LJ 76, pp. 90-1.

11 Ibid, p. 91.

gestures or acts being seen as vehicles for conveying or expressing ideas and feelings.[12] The majority judgment of the Supreme Court of Canada in *Irwin Toy v. AG Quebec* held that:

> The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written and spoken word, the arts and even physical gestures and acts . . . . If the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee.[13]

From what has been concluded in *Irwin Toy*, an expression can then be generally defined as the intentional conveyance of a message. In recent decades, there has been a growing significance of visual imagery as the means of communication or conveyance of messages. A visual image may not usually convey a message in an obvious or direct sense, but somehow it can convey information or ideas in a way that words cannot -- i.e., "a picture is worth a thousand words."[14] It is submitted that visual imagery should be within the scope of expression protected under Article 16(2) of the B.O.R.

There has been a general trend in advertising moving from plain information to visual image. Classified advertisements are typical examples of informative advertisements because they provide no more information than the availability of some products or services at a certain price to the interested segments of the public.[15]

Cigarette advertisements generally rely on visual images, which are thought to be the most effective means of selling a product; by associating the particular brand of cigarettes with a particular message of lifestyle (lifestyle advertising). They may associate the brand with vitality, masculinity and sexual attractiveness[16]. Basically, different brands are marketed to appeal to specific target groups.[17] Through repetitions, the messages which cigarette advertisements convey may succeed in creating attitudes and inclinations among the viewers because they present themselves as natural, ordinary and routine, and as something that does not carry significant meaning, and therefore does not require any thoughtful examination of their contents.[18] The deceiving and manipulative nature and effects of cigarette advertisements cannot be regarded as insignificant, rendering cigarette advertisements likely to be excluded from falling within the scope of protected expression according to the classical doctrine. However, it is submitted that tobacco advertising should not be precluded from being a protected expression within the scope of Article 16(2) of the B.O.R., in that Article 16(2) is both wide and specific enough to cover "information and ideas of all kinds". And since cigarette advertisements do in fact convey information and ideas of their own nature to some extent, notwithstanding the messages they convey are more than likely misleading or

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12 Ibid, p. 102.

13 Ibid, pp. 96 & 102, quoting from *Irwin Toy v. AG Quebec* [1989] SCR 927, p. 969.

14 Ibid, p. 106.

15 Ibid, p. 109, footnote 97, quoting from T. Vestergaard & K. Schroder, *The Language of Advertising* (Oxford: Blackwell, 1985), p. 3.

16 See note 10 above, p. 118.

17 See note 2 above, p. 24. Tobacco companies do introduce brands aimed specifically at women, the advertisements of which suggest that women who smoke are sexually attractive, exciting, liberated, ambitious and fun loving.

18 See note 10 above, p. 115.

manipulative to the audience, it is only logical and reasonable to recognise the right of tobacco advertising to be regarded as a form of expression under Article 16(2).

In a recent Canadian case concerning whether the Act which prohibits all advertising and promotion of tobacco products offered for sale in Canada (with an exemption for advertising of foreign tobacco products in imported publications) infringes the Canadian Charter of Rights and Freedoms, the Attorney General of Canada has acknowledged that the impugned legislation restricts freedom of commercial expression, that such freedom of expression is protected by s 2(b) of the Charter, and that the Act violates s 2(b) of the Charter.[19] The Quebec Court of Appeal has actually accepted that tobacco advertising is in fact a kind of protected expression under s 2(b) of the Charter, and that the rights and freedoms of which are subject to such reasonable limits as prescribed by law can be demonstrably justified in a free and democratic society, ie, s 1 of the Charter.[20] Though the case is only persuasive and not binding authority, it can give valuable guidance as to the proper approach to the interpretation of the B.O.R. as it is a decision from a common law jurisdiction.[21]

IV. Relationship between Restrictions on Tobacco Advertising and Freedom of Expression

Should tobacco advertising be recognised as a form of expression under Article 16(2), then any restrictions on tobacco advertising should *prima facie* constitute an infringement of freedom of expression subject to its restriction in Article 16(3). There are in general three rationales being identified as possible explanations for the constitutional protection of expression. These are: a) freedom of expression is essential to democracy; b) freedom of expression protects an open exchange of views; and c) freedom of expression recognizes the autonomy of an individual to make choices and to establish one's own values.[22] To what extent does the freedom of advertising tobacco products fall within any of these three rationales for its constitutional protection is to be assessed as follows:

A. Freedom of Expression and Democracy

A democratic system enables ideas and information to compete and circulate, allowing different voices to be heard. It is of special importance to protect freedom of expression as

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19 *RJR-MacDonald Inc v. Canada (AG)* 102 DLR (4th) 289, p. 328. The case is currently pending appeal to the Supreme Court of Canada. Section 2(b) of the Canadian Charter of Rights and Freedoms states that: "Everyone has the following fundamental freedom... '(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.'"

20 Ibid, p. 290 (Headnote).

21 It was pointed out in *R v. Sin Yau Ming* (1991) 1 HKPLR 88 that "[i]n interpreting the Bill of Rights Ordinance considerable assistance could be gained from the decisions of common law jurisdictions with a constitutionally entrenched Bill of Rights (in particular Canada and the United States)...While none of these were binding, in so far as they reflect the interpretation of articles in the ICCPR and are directly related to Hong Kong legislation, these sources are of the greatest assistance and should be given considerable weight." (Headnote, para 3, p. 89)

22 See note 8 above, p. 232.

regards minority views, including those that offend, shock or disturb the majority,[23] and not merely to protect "information "or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference. Such are the demands of pluralism, tolerance and broad-mindedness, without which there is no "democratic society".[24] Cigarette advertising, though it may offend anti-smokers and others, particularly those engaging in anti-smoking campaign, such as COSH, shall be allowed to be protected; for a democratic society shall allow different voices to be heard, and different information and ideas to be circulated. Especially in view of anti-smoking messages being conveyed in the mass media, different messages should be allowed to compete with each other fairly. As long as cigarettes are lawfully sold and smoking is not illegal in general terms, the value of individual access to information and ideas guiding private choices should be respected, and any government efforts to manipulate those choices by impairing the free flow of information without any lawful justifications should be condemned.[25]

B. Freedom of Expression Protects an Open Exchange of Views

The traditional market-place of idea analysis endorses that the best test of "truth" is the power of the thought to get itself accepted in the competition of the market-place of ideas. It would require that there should be no restrictions on the communication of ideas and information, no matter how offensive and disturbing they may appear to be. In order to counterbalance the effects of those messages, the measures to be adopted should not be censorship or restriction but more speech, so that truth ultimately triumphs over falsehood.[26] There seems to be an obvious affinity between the market-place of idea analysis and forms of expression articulated in a way to facilitate the market place in goods and services. There is an interest in having the truth about material goods and services, and advertisements may provide consumers with information needed to assess the truth about available products and their prices in order to make accurate choices. There is a strong case that advertising should be protected as a form of expression.[27] Proponents of the restrictions on tobacco advertising argue that such advertisements provide no information for evaluation of their truthfulness and therefore they should not be categorized as a protected expression; however, they ignore the fact that cigarette advertisements, to say the least, do provide information about the availability of the product, the tar group designation, and the health risks associated with its use. Nevertheless, it is not such information that troubles proponents of restrictions on tobacco advertising, but rather the use of positive imagery in the advertisements that associate smoking with beauty, glamour, independence, sexiness, and well-being, i.e., the use of lifestyle advertising that glamorizes smoking.[28] It is arguable whether lifestyle advertising contains any "truth" or

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23 Kevin Boyle, "Freedom of Opinion and Freedom of Expression" in Johannes Chan & Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong: Butterworths Asia, 2nd ed, 1993), p. 307.

24 Ibid, p. 318, quoting from *Handyside v. UK* (1976) 1 EHRR 737, para. 41.

25 Krista L. Edwards, "First Amendment Values and the Constitutional Protection of Tobacco Advertising" (1988) 82 (No. 1) Northwestern U L Rev 145 p. 176.

26 Yash Ghai, "Freedom of Expression" in Raymond Wacks (ed), *Human Rights in Hong Kong*, (Hong Kong: Oxford University Press, 1992), p. 380. The term "market place of idea analysis" is discussed more fully in this article.

27 See note 8 above, pp. 234-235.

28 See note 25 above, pp. 116-7.

whether it precludes "truth" from being discovered. It is submitted that the issue is so open in nature that it should be left to the audience to judge.

C. *The Relationship between Freedom of Expression and the Autonomy of an Individual*

Preservation of autonomy requires that "no government have the authority to distort the individual's ultimate choice by preventing him from hearing any argument solely because it is on one side of the issue rather than another."[29] According to Professor Thomas Scanlon, freedom of expression is "a consequence of the view . . . that a legitimate government is one whose authority citizens can recognise while still regarding themselves as equal, autonomous, rational agents."[30] Professor Scanlon's theory is based on the respect for the listener's freedom of thought.[31] It is then submitted that autonomy refers to the right of the listener to be free from government's interference with the attempts of others to persuade him.[32] Applying the above submission to the issue of restrictions on tobacco advertising, one may identify that they may offend the listener's autonomous rights in that the government is presumed to have decided that the listener is not free to hear or receive any information or ideas from cigarette advertisements, about which he is free to do so. Since smoking is legal and cigarettes are lawfully sold, one would question that the government hopes, by suppressing the expression of information and ideas which cigarette advertisements convey, to manipulate covertly the individual's desire to engage in smoking.[33] The restrictions or even ban on such advertising limit or suppress advocacy of a particular point of view from an idea that the advertisements convey with respect to certain satisfactions and qualities smoking would bring to the consumer's life, which constitute major violations of autonomy in that from the listener's or consumer's perspective the promotion of that point of view may be an appeal to his beliefs.[34]

V. *Application of the Bill of Rights to the Issue of Restrictions on Tobacco Advertising*

Should the restrictions on tobacco advertising constitute a *prima facie* infringement of freedom of expression as stated in Article 16(2) of the B.O.R., the issue is whether those restrictions can be justified in the provisions of Article 16(3).[35] A similar approach was

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29 See note 9 above, p. 648, quoting from F. Schauer, *Free Speech. A Philosophical Enquiry*, p. 69.

30 Ibid, p. 648, quoting from Scanlon, "A Theory of Freedom of Expression" [1972] J Phil & Pub Aff 204, p. 214.

31 Ibid. Freedom of thought is also protected in Article 15 of the Bill of Rights. According to Prof. Scanlon, it is submitted that the listener's freedom of thought relates to his freedom to receive information and ideas of all kinds as in Article 16(2) of the B.O.R.

32 See note 9 above, p. 650.

33 This may be justified because the government has a policy to discourage smoking.

34 See note 9 above, pp. 650-1.

35 Article 16(3): "The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary - (a) for respect of rights and reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or

adopted in the Canadian case of *RJR-MacDonald Inc v. Canada (AG)* when the court recognised that the extent of the ban of tobacco advertising in Canada constituted a *prima facie* infringement of s 2(b) of the Canadian Charter, which then had to be demonstrably justified in pursuance of s 1 of the Charter.[36]

Article 16(3) mentions that the exercise of the rights of freedom of expression carries with its "special duties and responsibilities" which may arguably include the duty to convey information and ideas accurately, truthfully and impartially by not merely the mass media, but also any individual or bodies trying to convey their messages to the public, and that tobacco advertising is no exception.[37] As far as tobacco advertising is concerned, it should be obvious that the ground for its restrictions is based on the need to protect public health. In the *Open Door Counselling case*, it was held that

> the Court must examine the question of "necessity" in the light of the principles developed in its case law. It must determine whether there existed a pressing social need for the measures in question, and, in particular, whether the restriction complained of was "proportionate to the legitimate aim pursued".[38]

A similar principle was devised in the American case *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*[39] for the justification in restricting commercial speech. It was held that in doing so the state had to satisfy three concerns: (a) was the state's interest in restricting commercial speech "substantial" ? (b) if yes, was the regulation in question one that would directly advance this substantial state interest? (c) even if it was, could the state interest be as well served by more limited, less intrusive means ?

In applying the principle of *Open Door Counselling* devised by the European Court of Human Rights for determining whether such a need to protect public health exists, there must be a pressing social need for the measures in question, i.e., the restrictions on tobacco advertising. The measures complained of must also be proportionate to the legitimate aim pursued by the Hong Kong Government which is to discourage smoking.[40] The measures adopted must be prescribed by law, which are stated from ss 11 to 15 of the Smoking (Public Health) Ordinance.[41] The principle has been adopted by the High Court in Hong Kong.[42]

The Supreme Court of Canada in *R v. Oakes*[43] held that a number of requirements must be satisfied to show that a limit on a right is demonstrably justified according to s 1 of the Canadian Charter. There must be a pressing and substantial legislative objective; the measures taken in pursuing the objective must be proportionate to the objective; and the

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morals."

36 See note 20 above.

37 See note 23 above, p. 309.

38 *Open Door Counselling and Dublin Well Woman v. Ireland* (1992) 15 EHRR 244, p. 286, para 70.

39 Referred to in "Commercial Expression and the Charter", see note 8 above, p. 245.

40 This is stated in the *Consultation Paper on Anti-Smoking Proposals* (August 1992), see note 5 above, p. 1.

41 What is referred to is the substituted s 13 after the amendment on 30 January 1992.

42 See *In the matter of an application pursuant to Order 53 of the Rules of the Supreme Court for leave to apply for judicial review and in the matter of the Control of Obscene and Indecent Articles Ordinance*, Cap. 390 (1994) HCt, MP No. 1245 of 1993.

43 [1986] 1 SCR 103.

measures must be rationally connected to the objective and impair as little as possible the protected freedom.[44] That approach was adopted by the Hong Kong Court of Appeal in the classic case *R v. Sin Yau Ming*,[45] and it is not unreasonable that the same approach may be adopted again to justify the necessity for the restrictions of freedom of expression, and in the present discussion the restrictions on tobacco advertising. No matter which approach will be adopted -- Canadian, U.S., or the European Court's -- the onus is on the authority restricting a right to justify such restriction.

A. Pressing Social Need

The Hong Kong Government has had a policy since 1975 of discouraging cigarette smoking, particularly amongst the young, and educating the public on the health risks involved. There seems to be a general consensus within the medical profession that the consumption of tobacco constitutes a major health problem in Western societies. A great deal of evidence supports the findings that cigarette smoking relates to many deaths each year from cancer and diseases of the lung, heart, and circulatory system.[46] As it was stated in *RJR-MacDonald Inc.*, "[i]n the opinion of the court, the struggle against tobacco use constitutes a sufficiently important objective in a free and democratic society such as ours to justify a restriction on a freedom guaranteed by the Charter. The Crown has therefore satisfied the first test of justification under s 1 of the Charter."[47] There is no doubt that the objective sought, i.e., discouraging cigarette smoking, relates to a substantial and pressing public health problem, and that a restriction on the rights and freedoms as stated in Article 16(3) of the B.O.R., through the adoption of measures that are effective and in proportion to that objective, may indeed be justified.[48]

B. Rational Connection between the Measures Adopted and the Stated Objective

The measures adopted are the various means of restrictions on tobacco advertising, and it is important to determine whether there is a rational connection between them and the stated objective which is to discourage cigarette smoking, i.e., the decrease of tobacco consumption. In other words, there must be a real connection between tobacco advertising and the consumption of tobacco, which must be established by a preponderance of evidence on a reasonable or rational basis. Whether there is any such connection is still unresolved and will be hotly debated for years to come. There is no general consensus from statistics and research studies establishing a positive correlation between the volume of advertising and the volume of cigarette consumption. In *RJR-MacDonald Inc.*, the Attorney General of Canada even acknowledged that "based on the scientific knowledge in existence when the Act was adopted . . . that the state to which science had evolved at the time did not allow any correlation to

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[44] Geoffrey Marshall, "Taking Rights for an Override: Free Speech And Commercial Expression" [1989] PL 4, p. 9.

[45] See note 21 above.

[46] See note 2 above, p. 30. The evidence linking smoking with diseases is just statistical and no causal relationship has been proven.

[47] See note 19 above, p. 334. The statement made by the trial judge of the Superior Court of Quebec was approved by Quebec Court of Appeal.

[48] See note 19 above, p. 291.

be established between advertising and consumption."[49] Nevertheless, reliance on the correlation is not limited to the state of science that existed at the time the measures were adopted.[50]

In determining the nature of the onus required to establish the connection between advertising and tobacco consumption, there was no consensus in *RJR-MacDonald Inc.* Brossard J.A.'s view is that it has to be shown on a balance of probabilities that it is at least possible that there is a rational connection between advertising and tobacco consumption;[51] while LeBel J.A. and Rothman J.A. share the view that it is often difficult, if not impossible, to prove in the ordinary whether a particular measure would in effect achieve its objective, and as long as there is a reasonable basis for concluding that the measure would achieve its objective one can safely conclude that there is a rational connection between the measure and its objective.[52]

However, after regarding the possible effects of lifestyle advertising on young people and adolescents, Brossard J.A. was of the opinion that cigarette advertisements of that kind might induce them to use tobacco products, and he concluded that as long as there was a real and factual possibility of a direct correlation between advertising and consumption, it would be sufficient to meet the rationality test prescribed in *Oakes*.[53] From what he concluded it seems that only lifestyle tobacco advertising justified an appropriate legislative measure, provided that the measure meets the other criteria.

It is not surprising that tobacco companies use such images as the Marlboro cowboy to promote and market their products to young people, to whom much of the thematic content of tobacco advertising is supposed to be directed. It would be hard to understand how cigarette marketers, having employed costly and sophisticated research techniques, develop role model images like cowboys and glamorous models without being aware of the potential impact on young people and adolescents.[54] Having said that, one should not discard the possibility that those who decide to smoke may do so without the allure of advertising: and researchers now realize that our attitudes and behaviours develop in response to a combination of many interacting sources of input, and in the case of smoking, the combined influences from family, schools, peers, the media and others.[55] Cigarette advertisements may therefore not be the determining factor of the initiation of smoking among young people. Moreover, statistics from certain countries, including Norway, Finland, Italy, Iceland and Singapore, where a ban on tobacco advertising is in place, have indicated that tobacco consumption has risen, particularly among adolescents, despite the ban. It follows that there is no concrete evidence to support the view that there is a rational connection between advertising and tobacco consumption or that a ban on advertising would result in reduced tobacco consumption and fewer new smokers.[56]

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49 See note 19 above, p. 385.
50 Ibid.
51 Ibid, p. 382.
52 Ibid, p. 313.
53 Ibid, pp. 385-6.
54 See note 2 above, p. 22.
55 See note 25 above, p. 173, quoting from Arbogast, "A Proposal to Regulate the Manner of Tobacco Advertising" 11 J Heath Pol Pol'y & L 393, p. 418.
56 RG Lawson, "Advertising Tobacco Products", (1991) 135 (No. 41) SJ 1184, p. 1185.

C. *Minimal Impairment of Freedom of Expression, and Proportionality between Measures Adopted and the Aims to be Achieved*

The two criteria are so closely related to each other that their combined effects relate to whether the measures adopted can achieve the aims in a way that would restrict the freedom as little as possible, and whether there are other alternatives available.

The present measures adopted to restrict tobacco advertising are stated in the Smoking (Public Health) Ordinance, the essence of which are as follows:

(i) Under s 11, cigarette advertisements in printed publications are required to carry a health warning and tar group designation.[57]
(ii) Under s 12, cigarette advertisements for display must bear a prescribed health warning.
(iii) Under s 13 and s 13(A) cigarette advertisements on radio and television and in cinemas are prohibited.

Notwithstanding the above measures adopted to restrict tobacco advertising, it can be noted that s 14(3) of the Ordinance has been amended, the effect of which permits sponsorship of social events and activities and of any product not being tobacco by tobacco companies. Furthermore, the advertisements of those tobacco-sponsored events or activities and products, which mention the trade name or brand name or the name of the tobacco companies, are not categorized as cigarette advertisements, which means that they can be shown on television and radio and in cinema, and do not have to bear a prescribed health warning![58] Sections 11 and 12 deal with the requirement of bearing a prescribed health warning in cigarette advertisements in printed publication (with tar group designation) and for display. It is submitted that this measure is less intrusive of freedom of expression and yet could be as effective in achieving the objective of curbing tobacco consumption. It may be argued that the effect of the warnings could be negated and neutralized by the visual image of well-being that dominates the advertisement since one may dissociate oneself from the verbal warning of disease and associate with the picture of vitality and pleasure.[59] However, every person has the freedom of opinion and thought without interference,[60] and it is only fair to allow both messages in the advertisement to compete with each other in an open market of ideas. The provisions in ss 11 and 12 are therefore considered to be acceptable.

Section 13 deals with the total ban of cigarette advertisements on television and radio.[61] The provisions state that

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57 From Smoking (Public Health)(Notices)(Amendment)(No. 2) Order 1992.

58 Section 14(3): Notwithstanding subsection (2), an advertisement which mentions
(a) the name of any company or body corporate associated with the manufacture or marketing of cigarettes or cigarette tobacco; or
(b) any name identified with the trade name or brand name of any cigarette or cigarette tobacco, in association with any product not being tobacco,
as the sponsor of an event or as congratulating another person or thing on an achievement of, or event relating to, such person or thing and which does not mention the words "cigarette", "cigarettes", "smoking", "tobacco", or "tobaccos" shall be deemed not to be a cigarette advertisement.

59 See note 25 above, p. 174.

60 They are guaranteed by Art. 16(1) and Art. 15(1) of the B.O.R. respectively.

61 Section 14(3) of the Smoking Ordinance contains provisions which exclude advertisements of tobacco-sponsored activities from being cigarette advertisements.

no person shall broadcast a cigarette advertisement--
(a) by the transmission of sound by means of radio waves; or
(b) by the transmission of visual images or sound by wireless or otherwise than by wireless,
for reception by members of the public.

Basically, it prohibits broadcasting of cigarette advertisements by radio, or by visual images which cover both wireless television signal and non-wireless television signal such as Satellite T.V. and Cable T.V. Section 13(A) further states that no person shall exhibit a cigarette advertisement by film in a cinema.

Television and radio broadcastings are powerful media, and it seems that the total ban of cigarette advertisements on television and radio is overdone. As discussed above, since there has been no concrete evidence of a rational connection between advertising and tobacco consumption, a total ban on television and radio broadcast of cigarette advertisements may not achieve the aim of curbing tobacco consumption, particularly in view of the provisions in s 14(3) which have the effect of allowing advertisements of tobacco-sponsored events, activities or products to be broadcast on television and radio and in cinemas.[62] It is more than obvious that tobacco sponsorship is "cigarette advertising in disguise", and surprisingly, statements from the tobacco industry itself reveals their real purpose in sponsorship. Sponsorship, it was stated, "is a form of advertising which enables [them] to introduce glamour and excitement", with emphasis on the merit of sponsorship linked to prestigious events.[63] It is submitted that the provisions in s 13 and s 13A may not be as effective to curb tobacco consumption as such, and may constitute an excessive impairment of freedom of expression.

The Hong Kong Government may have other possible alternatives which may not be ineffective to curb tobacco consumption with minimal impairment of freedom of expression. They are submitted as follows:

(i) Sponsoring advertisements and other social activities warning of the hazards and the anti-social phenomenon associated with smoking.[64]
(ii) Requiring schools to institute educational programs advising children and adolescents about the harm of smoking.
(iii) Limiting the contents of cigarette advertisements to price, brand name, tar group designation, and health warning only.
(iv) Banning the broadcast of cigarette advertisements on television and radio only during children's time and prime time so as to protect school children from the possible harmful effects of cigarette advertisements as much as possible.[65]

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62 Examples are "Marlboro Redhot Hits", "Kent Travel", "Salem Tennis Tournament", etc.

63 Judith MacKay, "Tobacco Sponsorship", Speech at Jubilee Sports Centre Sporting Luncheon Club, 8th February 1988, p. 3, quoted from *SCMP Business News*, 12th February 1986.

64 The Government is currently adopting that measure. The message in an anti-smoking advertisement in relation to health particularly is based on established medical evidence and could be said to be more direct and straightforward than that in a smoking advertisement in its attempt to allure smokers to switch brand.

65 The Government adopted similar measure before the amendment of the Smoking Ordinance in 1992.

VI. Conclusion

It is doubtful that the ban on tobacco advertising on television and radio and in cinemas would not be inconsistent with Article 16 of the Bill of Rights. Freedom of expression includes the right of the speaker as well as the right of the listener. The listener's interest has to be protected under the market-place of idea analysis and as an aspect of the listener's individual autonomous interest in expression. Having said that, some advertisements from tobacco companies are exempted from the ban, and should they be viewed and treated as "cigarette advertisements in disguise", then the above measures may only be viewed, for practical purposes, as minimal impairment of freedom of impression, and may not be inconsistent with the Bill of Rights as such. Since an outright ban of the sale of tobacco would have drastic consequences to a considerable proportion of the population who are smokers as well as unthinkable consequences for industry, social events, employment, and taxation, a total ban on cigarette smoking and the sale of tobacco should be out of question. As long as cigarettes remain legal, the justification for the present restrictions or the proposed total ban on tobacco advertising is weak, particularly in view of tobacco sponsorship being permitted to exert its influence to the public not merely by promoting its brand name and products but by buying culture, prestige, and respectability.[66]

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[66] See note 63 above, p. 1.

LAND LAW DEVELOPMENT IN THE PEOPLE'S REPUBLIC OF CHINA

CATHY YEUNG CHEUNG-YING*

I. Historical Development

Since the establishment of the People's Republic of China ("PRC") in 1949, land in China has been owned either by the State or collectives. The real estate market was abolished. The replacement of the planned economy led to a land system in which land was basically allocated administratively to various users including enterprises and governmental institutions free of charge for indefinite durations. In addition, land cannot be regarded as a commodity.

Since 1978, China has begun the economic reform and open door policy and the progress of land reform which took place between 1978 and 1987 was encouraging but still relatively slow. Indeed, Article 10 of the 1982 Constitution of the PRC clearly provides that "[n]o organization or individual may appropriate, buy, sell or lease land or unlawfully transfer land in other ways". Moreover, Article 2 of 1986 Law of the PRC on Land Management[1] also had the same restriction. However, the old land system became increasingly incompatible with the needs arising from economic reforms and was not able to safeguard the legitimate rights and interests of land users.

In order to meet the needs of economic reform and set up a new land system so as to attract more foreign investment, a major legal breakthrough came in April 1988 when Article 10 of the 1982 Constitution was amended to omit the word "lease" from the general prohibitions applicable to organizations or individuals with regard to dealings in land. Moreover, a new provision was also inserted as part of Article 10 stipulating explicitly that "land-use right can be transferred in accordance with law". This amendment marked the establishment of a new land system for the granting or transferring of land-use rights. This is a turning point in the PRC's land law. It paved the way for foreign investment in the PRC property market.

Simultaneously, Article 2 of the Law of PRC on Land Management was also amended in response to the amendment of the Constitution by inserting a new provision stipulating that:

> [t]he right to use state-owned or collective owned land may be assigned pursuant to the law. Detailed measures governing the assignment of the land-use rights shall be determined by the State Council in separate legislation. The State shall implement a compensatory land use system for State-owned land pursuant to the law. Detailed measures governing the compensatory usage of State-owned land shall be determined by the State Council in separate legislation.

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1 For the authoritative Chinese text and English translations of the laws cited in this note, please refer to *Statutes and Regulations of the People's Republic of China* (Hong Kong: Institute of Chinese Law (Publishers) Ltd.) or *China Laws for Foreign Business: Special Zones & Cities* (CCH International) or *China Law & Practice* (Asia Law & Practice Ltd.) or *China Current Laws* (Longman Group (Far East Ltd.)).

Therefore, the State Council of the PRC promulgated the most important piece of regulation regarding the grant and transfer of land-use rights on 19 May 1990: Interim Regulations of the PRC Concerning the Grant and Transfer of the Right to the Use of State-owned Land in Urban Areas ("Regulation of grant and transfer of land-use rights"). It lays down the basic conditions and formalities for the grant and transfer of land-use rights and real property, which will be elaborated later on.

Another important piece of regulation of national application is the Provisional Measures on the Administration of the Rights to the Use of Allocated Land ("Regulations of allocated land") promulgated on 8 March 1992. It governs how land originally allocated by the State can be transferred, rented or mortgaged.

These two pieces of legislation provide two parallel land compensatory systems. The first deals with "grant of land-use rights", which refers to the act by which the State, in its capacity as land owner, grants the right to use land for a certain duration to a land user and the land user pays to the State a premium for the grant of the right to use land; a land user who has lawfully acquired the land-use rights may assign, lease and mortgage such rights or utilize such rights in other economic activities within the time limit for such use. The second deals with "allocated land-use rights", which refers to the land use rights which land users procure through various means other than land-use rights grants, i.e., by administrative allocation.

Apart from the national legislation, local governments are also authorized to enact legislation for local application. Since national legislation is usually too general to be implemented, various local governments such as Beijing, Shanghai, Tianjing, Guangzhou, Shenzhen, Zhuhai, Zhejiang, and Shangdong, often have issued similar local legislation and regulations on land administration, development and investment in order to implement and supplement national legislation and to regulate the local real estate market. To some extent, these local regulations seem to be more aggressive than the national legislation.

Since the implementation of the above legislation, a real estate market has been formed and developed very quickly. In a short time, land investment became the hottest industry in China. Inadvertently, many problems are arising from the progress of the development of real estate, such as the abuse of land grant power, illegal transactions and speculations, etc. These problems indicate that the current legislation contains many loopholes, and further legislation is necessary to adjust the abnormal practice in the real estate market. As a result, the Law on Management of Real Estate in Urban Areas of the PRC ("the new real estate law") was promulgated on 5 July 1994 by the 8th Session of the Standing Committee of the National People's Congress (NPC) of the PRC, coming into effect on 1 January 1995. This law was enacted to strengthen the management on real estate development in urban areas and set up an effective real estate market so as to protect lawful interests of land users. The new real estate law is very important for it is the first national law dealing with various aspects of land development such as the grant, assignment, mortgage and lease of land-use rights. It further lays down principles for the title registration of real estate. Although it is rough and equivocal in some places, it is expected to pave the way further for the land development and real estate market of the PRC in the future and solve problems which arose in the past.

II. Ownership of Land

China practises the socialist public ownership of land, which is defined as either ownership by the whole people or ownership by the collective. The former is usually called "State owned land", and refers to land in urban areas; the latter is usually called "Collective-owned land" and refers to land in rural and suburban areas, except for that land stipulated by law to be owned by the State. Residential sites, privately retained plots and hilly areas are collectively owned in accordance with law. Meanwhile, the basic principle of PRC land law is to separate the ownership of land from the right to use the land. Land users may enjoy so-called "land-use rights", which refers to a number of rights on land such as the right to develop, the right to use, and the right to transfer according to the stipulations of laws in certain duration. The State, as the owner, will not revoke land-use rights which were acquired lawfully before their expiration. But in special circumstances, where it is necessary for public interest, land-use rights may be revoked in accordance with legal procedures, and appropriate compensation will be paid depending on the development of the acquisitioned land. Only the State-owned land can be granted to land developers. Collective owned land should be changed into State-owned land before it is granted.

III. Land Use Rights

How can one acquire land-use rights under present PRC land law? Pursuant to the new real estate law, land-use rights in the PRC can be generally acquired in one of the following ways: (i) grant; (ii) transfer or (iii) lease.

A. Grant of Land-use Rights

The acquisition of land-use rights by way of grant is similar to the acquisition of estates by way of Crown Lease in Hong Kong. "Grant" refers to the act of the State, who, as the owner of the land, assigns a right to use the land for a designated purpose to a land-user under a land grant contract within a certain number of years. The land user in turn pays to the State a premium for the grant. The State still remains as the owner of the land and the land-users only acquire a land-use right for a certain duration, rather than ownership of the land. Moreover, all natural resources, minerals or antiquities are excluded from the grant.

A grant may be obtained either through negotiation, tender or auction. The new real estate law further provides that a tender and auction should be adopted in terms of granting land for the purposes of commercial, tourism and luxurious residential development if the circumstances allow.

The formality for a grant is a written land grant contract which shall be entered into between the State, usually represented by the Land Administrative Bureau at county level or above, and the land user, in accordance with the principles of equality, voluntary participation and consideration. A land grant contract comes into effect from the date on which both parties sign it. The written land grant contract is different from a deed in the common law system as there is no requirement for seal and delivery. In general practice, a land grant contract is usually standardized by the local land administrative bureau. Land-users are rarely able to amend any terms of a land grant contract except the name of the land users, the location, the aggregate area, the premium, the purpose and the duration of the use of the land, unless they

are a giant developer who can significantly affect the development of that locality, or have a very good relationship with the local government.

The maximum term that can be granted for land-use rights varies according to the designated purpose of the land, and it can also vary between different localities. The following maximum limits are specified in the "Regulation of grant and transfer of land-use rights":

i) 70 years in the case of land used for residential purposes;
ii) 50 years in the case of land used for industrial purposes;
iii) 50 years in the case of land used for educational, scientific, technological, cultural, public health or sports purposes;
iv) 40 years in the case of land used for commercial, tourism or recreational purposes;
v) 50 years in the case of land used for comprehensive use or other purposes.

As to land premiums, it is required that land users pay in full the premium for the grant of land-use rights within 60 days after execution of the land grant contract. If a land user fails to make full payment according to land grant contract within such a time limit, the grantor has the right to rescind the contract and claim liquidated damages. Likewise, such a right also available to the land user in case the grantor breaches the land grant contract.

B. Transfer of Land-Use Rights

In accordance with the relevant national and local legislation, a transfer of land-use rights refers to the land user's act of assigning to somebody else his land-use rights obtained as a result of a grant from the State Land Administrative Bureau or one of its authorized organs. A transfer can take the form of a sale, an exchange, a gift or another way provided by law. In addition, a transfer can also be effected through invitation of tenders.

The difference between a grant and a transfer of land-use rights is that the land-use rights in the former are granted by the State as an owner of land, whereas the land-use rights in the latter are transferred by a land user subject to certain conditions provided in the original land grant contract.

The basic conditions for a transfer of land-use rights are provided in the new real estate law, which provides that no transfer is permissible unless the land has been developed or utilised in accordance with the time and other requirements as specified in the original land grant contract:

i) The transferor should have entered into a land grant contract with the relevant land authority;
ii) A grant premium in respect of the land-use rights must have been paid;
iii) Holding a State Land Use Certificate or a certificate of ownership in the case of transferring completed real estate;
iv) Developing the land according to the land grant contract, and more than 25% of total investment shall have been invested before the transfer in the case of real estate development.

A transfer of land-use rights will be invalid unless it proceeds in compliance with the following procedures:

i) A written transfer contract shall be entered into between a transferor and a transferee. This contract should explicitly indicate the way of acquiring the land-use rights and all required terms provided in relevant legislation. A transfer of such rights will also include the transfer of all rights and obligations contained in the original land grant contract, as well as the title to all above-ground construction and attachments. A transferor cannot transfer a right that he does not enjoy pursuant to the land grant contract.

ii) A transfer contract shall be registered with the local relevant authority at the county level or above within a specified period of time. A new Land Use Certificate will be issued and the name of the land user shall be changed accordingly. Some cities require the notarization of the contract.

The time limit for a land user to acquire land-use rights by means of transfer shall be the remaining period of the term specified in the land grant contract.

During the drafting of the new real estate law, whether the pre-sale of real estate should be allowed or prohibited was a vexed issue, as it could have caused speculation in the market. However, an open attitude was adopted and a pre-sale is permissible under the new law, subject to the following conditions:

i) Having paid a full premium for the grant of land-use rights and obtained a land use certificate;
ii) Having obtained a licence for construction of the building;
iii) Having invested more than 25% of total investment for the construction development of the part putting on pre-sale and ascertained the process and date of completion; and
iv) Having registered and obtained approval for the pre-sale from the relevant authority.

However, as far as the transfer of incomplete pre-sale property is concerned, the new law seems more cautious as it merely lays down a very general provision authorizing the State Council to make more detailed regulations. This is a grey area in the new real estate law. It is expected that the State Council's regulations will be published soon, otherwise the real estate market might be affected greatly.

C. Lease of Land Use Rights

Apart from grant and transfer, lease is another way to obtain land-use rights lawfully in the PRC. A lease of land-use rights refers to the act of a land owner or a land user as a lessor to lease that right pursuant to a lease agreement together with all above-ground buildings and other attached objects to a lessee who pays rent to the lessor. Again, no lease is possible unless the land has been developed and utilised in accordance with the terms of the original land grant contract. The new real estate law requires that a lease agreement shall be a written agreement, and shall be registered at the local real estate administrative department in accordance with the relevant regulations. However, few local authorities except Shenzhen have published these kinds of regulations.

Additionally, it must be ensured that a lease agreement is not in conflict with any laws, regulations or the contract for the grant of land-use rights.

In comparison with common law, in which leasing is a very important part of land law, the provisions in respect of leasing in the new real estate law look very simple and general. They need to be supplemented by local regulations.

D. Title Registration

Under the new real estate law, a title registration system is established for land use rights and real estate ownership. Although it is not explicitly stated that it is the act of registration of documents which vests the title in land users or purchasers, it is clear that once registered, the title and ownership cannot be challenged unless there are illegal elements involved. In other words, registration of title makes land-use rights or ownership complete. The document itself is not evidence of title. The evidence of title is the land-use certificate or certificate of ownership of the real estate. It is different from Hong Kong's deed registration system where the registration of a deed alone neither provides evidence of the vendor's ownership nor endorses nor guarantees the validity of a document. Failure to register may only affect the priority of the instrument when competing with other interests in the land.

However, at present, land-use rights and ownership of real estate are registered in different places. One is registered at a local land administrative bureau at the county level or above, while the other is registered at a local real estate administrative bureau at the county level or above. In practice, this situation is somewhat troublesome to land users. Thus, it is the intention of the new real estate law that these two departments should be merged in due course and a single real estate certificate should be created to replace the said two certificates. In fact, a unified system has been established successfully in the Shenzhen Special Economic Zone to furnish title registration conveniently.

IV. Conclusion

From the above introduction, one can see that the land law system in the PRC has been developing very fast in recent years. In the process, China has learned a lot from Western systems, especially from those within the common law system. It is easy to find in the PRC's new real estate law many concepts and procedures which are similar to those found in Hong Kong's land law. Surely, China is trying hard to narrow its gap with developed countries. One may be pleased to see the great development of the PRC's land law system, and expect that a better and more complete land law system will be established in China in the near future.

HONG KONG AND THE RIGHT OF SELF-DETERMINATION

MICHELLE CHAN MAN-SAN*

I. Introduction

The right of self-determination never has captured the attention of the people of Hong Kong. One of the major reasons is that most people are not even aware of the existence of such a right. The conclusion of the negotiations on the Sino-British Joint Declaration and the enactment of the Basic Law were done without regard to that right.

In this paper, I argue that the people of Hong Kong should have the right of self-determination. I begin by examining generally what the right of self-determination is and then proceed to argue that the people of Hong Kong qualify to enjoy such a right. I then put forward some of the arguments used to justify the withholding of such right to the people of Hong Kong. Lastly I examine the effect of such a right on the Sino-British Declaration and the Basic Law.

II. What is the Right of Self-Determination?

The right of self-determination originates from President Woodrow Wilson's 14 Points enunciated at the end of World War I, which purported to grant self-determination to the peoples in the Ottoman Empire and the Austro-Hungarian Empire.[1] Three principles were subsequently developed in pursuance of the concept: "peoples . . . must not be bartered about from sovereignty to sovereignty as if they were chattels or pawns in a game"; territorial questions were to be settled "in the interests of the populations concerned"; and "well-defined national elements" were to be given "the utmost satisfaction that can be accorded them without introducing new, or perpetuating old, elements of discord and antagonism".[2] But this right was not contemplated by the Great Powers as applicable to the colonies.[3] There was also no general regard to the demands of the people.[4]

The United Nations Charter was the first international treaty which upheld the principle of self-determination. Articles 1, 55 and 56 stress the obligation to "respect the right

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1 M. Pomerance, *Self-Determination In Law and Practice* (The Hague: Martinus Nijthoff, 1982), 52. See also Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990), pp. 27-28.

2 Hannum, ibid, p. 28. There were a number of drawbacks to this early version of the right such as the limited application to defeated nations and new states only.

3 Ibid, pp. 28-29.

4 The best example is the question of Aland Islands. It was suggested that if a referendum were held, it would show that people would choose to unite with Sweden. However, the Great Powers decided that Aland Islands should unite with Finland partly because of Finland's contribution to the war, the wishes of the non-Aland Swedish population in Finland, and partly because the Great Powers did not recognize the wishes of the people particularly if they would "disrupt order and stability" within the states. No referendum or plebiscite was held to ascertain the wishes of the people and it was only when such demands were consistent with the Great Powers' interest that would they be respected. Ibid, pp. 28-29.

of self-determination". But exactly what it encompassed remains unclear.[5] Nevertheless, this right was always being interpreted as the liberation of the non-self governing people from colonial domination.[6]

In 1960, the General Assembly of the United Nations adopted the 1515 (XV) resolution which states that "the subjection of alien subjugation, domination and exploitation" contravenes fundamental human rights and the Charter of the United Nations; and "all people shall have the right of self-determination . . . to determine their political status and freely pursue their economic, social and cultural development".[7] This resolution is important because it recognizes for the first time the right of self-determination of people in colonial territories.[8]

Various resolutions adopted subsequently reaffirmed this right.[9] It is also included in the two covenants on human rights.[10] Article 1 of the International Covenant on Economic, Social and Cultural Rights declares that "all people have the right of self-determination. By virtue of that right, they freely determine their political status, and freely pursue their economic, social and cultural developments".[11] The same wording appears in the International Covenant on Civil and Political Rights.[12] In 1970, the General Assembly of the United Nations adopted Resolution 2625 (XXV)[13] which elaborates the rights in a more detailed manner. It recognizes that the right of self-determination constitutes a significant contribution to contemporary international law and explains that the territories of a colony or other non-self governing territories have a status separate and distinct from the state administering it and that this status remains until the right is exercised.

The resolution also identifies four possible modes of implementing the right of self-determination: (1) establishment of a sovereign and independent state; (2) free association with an independent state; (3) integration with an independent state; or, (4) emergence into any other political status freely determined by the people.

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5 It has been suggested that the right is only a means to strengthen universal peace rather than an independent value. Antonio Cassese, "Political Self-Determination -- Old Concepts and New Developments", in Antonio Cassese (ed), *UN Law Fundamental Rights: Two Topics in International Law* (The Netherlands: Sijthoff & Noordnoff, 1979), p. 138.

6 This is the view held by most socialist countries, including the PRC, which is described as the champion of the less developed countries. However, the refusal to accept Hong Kong or Macau as colonies casts doubt upon PRC's sincerity and respect to such right. See Eric M. Amberg, "Self-Determination in Hong Kong: A New Challenge to An Old Doctrine", (1985) 22 San Diego L R 839 p. 841.

7 The resolution is called the Declaration of the Granting of Independence to Colonial Territories and Peoples. G.A. Resn. 1514 (XV) December 14, 1960 G.A.O.R., para. 2.

8 Cassese, see note 5 above, p. 141.

9 G.A. Resn. 1541 (XV) 15 December 1960; G.A. Resn. 2131 (XX) 21 December 1965; G.A. Resn. 2160 (XXI) 30 November 1966.

10 It has once been noted by some writers that the right of self-determination is at odds with other individual rights and hence the former is out of place in the covenants. But Cassese argued that "there is little sense in recognizing the rights and freedoms of individuals if the community in which the individuals live is not free." Cassese, note 5 above, p. 142. Might this be true for Hong Kong as well?

11 G.A. Gesn. 2200 21 UN. G.A.O.R. Supp. (No. 16) at 49, UN Doc. A/6316 (1966). It should be pointed out here that Britain has not made reservation to this right regarding Hong Kong. For further details, see Peter Wesley-Smith, "Settlement of the Question of Hong Kong", 17 Cal W Int'l L J 116, p. 118.

12 999 U.N.T.S., 171.

13 The Declaration on Friendly Relations and Cooperation Among States, G.A. Resn 2626 (XXV) 24 October 1970.

The right is further reaffirmed in two judicial decisions: the *Namibia Case*[14] and the *Western Sahara Case.*[15] In both cases, the court affirmed that the principle of self-determination is applicable to all non-self governing territories.

Thus, there is no significant level of consensus over the right of self-determination. It covers two aspects: external, which is the right of people to determine, free from foreign interference, their status in the international community; and internal, which includes the right of people to choose freely the form of government under which they wish to live.

III. Do the People of Hong Kong Have the Right of Self-Determination?

Who is qualified to enjoy this right? As discussed above it is agreed by many that all peoples should enjoy self-determination. But the UN Charter is silent on what is meant by "peoples". Subsequent resolutions and decisions affirm that self determination should be enjoyed by non-self-governing territories. Indeed, it has been observed that "the term 'peoples' encompasses all such inhabitants [of non-self governing territories] which is not, and has never been the subject of any dispute or argument . . . ."[16] It is not necessary to consider ethnicity, language, religion, or other objective characteristics of the colonized people. The mere fact that the territory is non-self governing is enough to satisfy the definition of "peoples".[17]

Hong Kong is a British colony ceded to Britain by China in the 19th century. The fact that Hong Kong was deleted from the list of the colonial territories of the UN Decolonization Committee does not alter Hong Kong's colonial status.[18] Moreover, it is possible to restore Hong Kong to the list.[19] Furthermore, the "highly visible presence" of the British administration "is sufficient proof of Hong Kong's continuing colonial status."[20] The action of the committee does not remove the right of self-determination from Hong Kong.[21]

Alternatively, it can be argued that the people of Hong Kong qualify as a distinct and separate national group. Hong Kong has a clearly defined territory, its own legal system (inherited from the English common law system), and a predominantly laissez-faire market economy. Though most of the people of Hong Kong are Han Chinese (the main ethnic group

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14 "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)", I.C.J. Reports 1971, p. 4.

15 Advisory Opinion I.C.J. Reports 1975, p. 12.

16 International Commission of Jurists (Geneva), *Countdown to 1997: Reports of a Mission to Hong Kong* (E & E Plumridge Ltd, Linton, Cambridge, England, 1992), p. 47.

17 It has been said that "the right to self-determination entailed the right to self definition". Jayawickrama, *Self-Determination: Report of the Martin Ennals Memorial Symposium on Self-Determination, Saskatoon, Canada* (International Alert and College of Law, University of Saskatchewan), 3-6 March 1993, p. 3.

18 The process of such deletion as requested by the PRC in 1972 on the basis that Hong Kong is part of China was "irregular". It was decided by a small committee headed by a pro-China chairman. The request in fact was met with objections and more importantly, the people of Hong Kong were not consulted in this matter. For further details, see Nihal Jayawickrama, "The Right of Self-Determination" in Peter Wesley-Smith (ed.) *Hong Kong's Basic Law: Problems & Prospects* (University of Hong Kong, Faculty of Law, 1990), p. 85.

19 There is in fact precedent. In 1986, at the request of South Pacific Forum and the Nonaligned Group, New Caledonia was inscribed as a non-self governing territory and restored to the list. Ibid, p. 93.

20 Ibid, p. 93.

21 International Commission of Jurists, note 16 above, p. 50.

in the PRC), they speak Cantonese and not Mandarin.[22] They also have a distinct cultural identity, for they not only possess some traditional Chinese cultural ideas but also receive Western influences with the constant exposure to and encounters with the outside world.[23] Furthermore, although 98% of the people of Hong Kong are Chinese, few are willing to be subject to PRC rule. Many of the present inhabitants of Hong Kong were once refugees escaping from communist rule. In addition, the feeling of being subjected to an alien domination can be based on "relative-levels-of-developments".[24] That is, because the level of development between Hong Kong and China is different, the feeling that Hong Kong is distinct from China is shared by many Hong Kong inhabitants.

Nonetheless, it has to be stressed here that the fact that Hong Kong is a non-self governing colonial territory without more is sufficient to qualify the inhabitants to have the right of self-determination.

It has been suggested that even if the right of self-determination is granted to the people of Hong Kong, it should not extend to the New Territories as the "lease" signed in 1898 will expire in 1997, and the New Territories will have to return to the PRC.[25] But this can be resolved by arguing that "when a legal system by virtue of which the title has been validly created disappears, the right can no longer be claimed under the new legal system. . . ."[26] This seems to be supported by an international case: the *Micquiers and Ecrehos Case*[27] which states that the original title to a territory ceases to be valid if there are new facts to be considered on the basis of new law. Today, since the colonial legal order no longer exists, the PRC cannot claim the legal title in respect of the 1898 lease.[28]

Therefore, it can be argued that the inhabitants of Hong Kong *prima facie* have the right of self-determination.

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22 The suggestion that there is a close "linguistic" link between Hong Kong and China is not entirely correct. Ibid, p. 51.

23 Peter Wesley-Smith, note 11 above, pp. 118-9; International Commission of Jurists, note 16 above, p. 49; Roda Muskat, "The International Legal Status of Hong Kong Under Post-Transitional Rule", (1987) 10 Hous J Int'l L 1, p. 6.

24 Pomerance, note 1 above, p. 16.

25 This view is supported by the International Commission of Jurists. The report states that, "...we accept that the UK is and has always been under the duty to return the New Territories to China and that the PRC is the 'landlord' to whom the New Territories must be yielded up." International Commission of Jurists, note 16 above, pp. 50-51.

26 Jayawickrama, above note 18, p. 94. Perhaps the term "legal order" clearer than "legal system".

27 I.C.J. Reports 1953, p. 56, referred to in Jayawickrama, ibid, p. 93.

28 It is suggested by Professor Wesley-Smith that even after the lease expires, the continual existence of the British administration as an act of state is sufficient to allow the Hong Kong Government to control the territories without any new treaty. The court will not question the government's authority despite the "illegality". For further discussion, see Wesley-Smith, note 11 above, pp. 127-132.

IV. Possible Arguments Against the Assertion of the Right of Self-determination

There are numerous arguments that Hong Kong should not have the right of self-determination. I have already examined a major one, that the inhabitants of Hong Kong do not constitute a "people" within the meaning of the documents on self-determination.[29]

There is an argument that Hong Kong should not have the right of self-determination because it cannot be self-sufficient. It is true that Hong Kong depends on the PRC for the supply of water and food but this should not be a pretext for the denial of self-determination. Trade agreements will always be sufficient to solve the problem.[30]

Another argument is that since Hong Kong is an apolitical society where the inhabitants are generally not interested in political matters and the political structure is unrepresentative and undemocratic the people of Hong Kong should not enjoy the right of self determination. But as clearly stated in the 1514 resolution, inadequacy of political, economic, social or educational preparedness should not serve as an excuse for the denial of self-determination.[31]

Aside from these arguments, there are numerous instances where inhabitants of colonial enclaves (i.e. small colonial units which are located within the territories of sovereign states) are being denied the right of self-determination because they disrupt the territorial integrity of the sovereign states.[32] Hong Kong is not a colonial enclave and thus it should not pose any danger to the territorial integrity of the PRC.

Closely connected with this exception is the assertion of territorial integrity and sovereignty by non-European states neighbouring various colonies. In 1972, three months after the PRC was admitted to the UN, it requested that Hong Kong and Macau be deleted from the list of colonies.[33] A letter addressed to the UN states that "the settlement of the question of Hong Kong . . . is entirely within China's sovereign right and does not fall under the ordinary category of colonial territories."[34] In other words, the PRC was asserting that Hong Kong has always been an integral part of China and the return of Hong Kong to China is the exercise of the right of self-determination of the entire Chinese population. Moreover, the PRC has always maintained that the unequal treaties signed in the 19th century are invalid and that the sovereignty of Hong Kong has always rested with China.

Regarding the PRC's claim that the treaties signed are unequal, it has never received support from international law. There has never been any international rule saying that a

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29 This "exception" is mentioned in the *Western Sahara Case*. Paragraph 59 of the opinion of the court asserts that in cases where the right of self-determination was denied, they were the "instances which were based on the consideration that a certain population did not constitute a 'people' entitled to self-determination." The *Western Sahara Case*, note 15 above, p. 34.

30 Amberg, note 6 above, p. 855.

31 Jayawickrama, note 18 above, p. 88.

32 Goa and Ifni are examples of such colonial enclaves which they were incorporated by India and Morocco respectively. For further details, see Hannum, note 2 above, p. 37.

33 This has already been discussed, see p. 83-84 above.

34 Nihal Jayawickram, "Public Law" in Raymond Wacks (ed.) *The Law in Hong Kong, 1969-1989* (Hong Kong: Oxford University Press, 1990), p. 51.

treaty is invalid simply because it was entered into at the conclusion of a war in which one side was defeated. The treaties signed were all valid transactions.[35]

Another point is that if the treaties are truly invalid, the PRC could claim sovereignty over Hong Kong at any time. There would be no need to have any negotiations with Britain. The date 1997 would be of no significance as well. Is it possible to argue that by negotiating a settlement for Hong Kong with Britain and the recognition of British administration in Hong Kong until 1997, the PRC has tacitly conceded the validity of the treaties?[36]

Moreover, can the PRC, by relying on the pre-colonial status of Hong Kong and the legal ties which existed at the time of the signing of the treaties, resume sovereignty over Hong Kong? The argument advanced by the PRC is not a novel one and over the years it has been used by many countries to justify their claims over neighbouring territories when the Europeans withdrew their administration from their colonies.[37] The question behind all of these arguments is this: which principle has priority, the right of self-determination or that of territorial integrity and national unity?[38]

In the *Western Sahara Case*,[39] Morocco and Mauritania both claimed that the right of self-determination was connected with the principle of national unity and territorial integrity, but the former should give way to the later so that pre-colonial states could be united with their dismembered parts. The court was of the opinion that Morocco and Mauritania had not established "any ties of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritania entity".[40] The court also said that there were "no legal ties of such nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and in particular the principle of self-determination . . . ."[41]

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35 If a treaty is signed today and both parties are parties to the Vienna Convention on the Law of Treaties, it might be invalid, for it would contravene article 52, which stipulates that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of principles of international law embodied in the Charter of the United Nations". But the Vienna Convention itself precludes any retroactive operation. See article 28. For more detailed discussion, see R. Muskat, "Hong Kong as an International Legal Person", (1992) 6 Emory Int'l L Rev 105, p. 113.

36 See Wesley-Smith, note 11 above, p. 126. See also International Commission of Jurists, note 16 above, p. 48.

37 Examples include the annexation of Hyderabad and Sikkim by India, Indonesia's invasion of West Irian and East Timor. These can be compared to the more fortunate Belize which was admitted to the UN as an independent state despite Guatemala's claim of sovereignty. Hannum, note 2 above, p. 37.

38 This confusion is partly caused by the U.N.G.A 1514 resolution. Paragraph 6 of states that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations". Pomerance suggests two possible interpretations : (1) that para. 6 merely refers to "*future* attempts to disrupt the territorial integrity of the newly independent of emergent states and that *past* territorial claims were not protected"; (2) that the reversion to a former sovereign is justified on moral and legal grounds. Though UN always claims that it adheres to the first interpretation, in practice, it sways between the two interpretations. The choice between the two always rests on "*whose* territorial integrity is pitted against *whose* self-determination" (italics original). Pomerance, note 1 above, p. 44.

39 See note 15 above.

40 Ibid, para. 162.

41 I.C.J. Reports, 1975 at 68, quoted in Malcolm Shaw, "The Western Sahara Case", (1978) 49 The British Yearbook of International Law 119, p. 148. But the wishes of the General Assembly were not respected by the countries concerned in the case. See Harris, *Cases and Materials on International Law*, (London: Sweet & Maxwell, 4th ed, 1991), pp. 122-23.

The *Western Sahara* decision has been criticized on the ground that it actually implies that territorial sovereignty could affect the application of the right of self-determination.[42] The case is also inconsistent with an earlier authority which states that the right is always applicable to non-self governing territories.[43] And unlike Morocco and Mauritania, the PRC has a much stronger "territorial claim". Does that mean that the PRC then has a legitimate claim over Hong Kong? Judge Dillard, in a separate opinion said, "it is for the people to determine the destiny of the territory and not the territory the destiny of the people".[44] Judge Boni also stated that even if there is a finding of ties of sovereignty, there is still the need to consult the inhabitants of the territory thus "affirming the right of self-determination as the prime principle involved."[45] Therefore, the territorial integrity and national unification argument put forward by the PRC arguably are not valid as they would lead to the derogation of the right of self-determination of the people of Hong Kong.

V. *Effect on the Joint Declaration and the Basic Law*

If the people of Hong Kong should enjoy the right of self-determination, how would the Sino-British Joint Declaration and the Basic Law be affected ?

It has been argued that the right of self-determination is a norm of *jus cogen*.[46] In the *Namibia Case*,[47] a separate opinion of the court states that, "the right of self-determination is a norm of the nature of *jus cogen*, derogation from which is not permissible under any circumstances."[48] A separate opinion of Judge Dillard in the Western Sahara case[49] also holds the same view. If this view is taken as correct, the Joint Declaration might be void under Article 53 of the Vienna Convention on the Law of the Treaties[50] unless it can be shown that the Declaration is the "result of the freely expressed wishes of the people acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal suffrage . . ."[51]

Throughout the negotiation process, the people of Hong Kong were not represented. The PRC specifically rejected the idea of a "three-legged stool" and asserted that it was purely a matter of transfer of sovereignty between the UK and the PRC.[52] The Governor of Hong

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42 Ibid, pp. 123-24 note 2.

43 *The Namibia Case*, note 14 above.

44 The *Western Sahara Case*, note 15 above, p. 114. (separate opinion of J. Dillard)

45 For more criticism of the case on self-determination, see Shaw, note 41 above, p. 149.

46 Alternatively, it has been argued that the right has assumed the status of a customary international rule. If this is so, then the UK and the PRC would both have breached the international rule. The problem remains as to who can bring such a claim on behalf of Hong Kong or if Hong Kong can bring a claim against the PRC and the UK ? Cassese, note 5 above, pp. 156-57.

47 See note 14 above.

48 See note 14 above, p. 74. This view is also supported by various writers. See Hector Gros Espiell, "Self Determination and Jus Cogens", in Cassese, note 5 above, p. 167; Jayawickrama, "The Right of Self-Determination", note 18 above, p. 97. Cf Muskat, note 23 above, p. 7.

49 See note 15 above.

50 Article 53 stipulates that "[a] treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law . . ." Harris, note 41 above, p. 790.

51 U.N.G.A. Resn. 1541, note 9 above.

52 Muskat, note 23 above, p. 5.

Kong, though involved in the negotiation process, was acting as a member of the British delegation rather than as a representative of Hong Kong. An assessment office was set up to analyze and assess the opinion of the people of Hong Kong but the British government warned that it was not possible to amend the Joint Declaration. The choice therefore is between "reversion of Hong Kong to China under an agreed, legally binding international agreement between the UK and PRC only" and "reversion to China without such arrangement."[53] Upon this "take-it-or-leave-it" basis, it can hardly be said that the wishes of the people of Hong Kong were freely expressed.

As for the Basic Law, it is well-known that the drafting committee was set up by the PRC and the majority of the members came from the mainland. The people of Hong Kong were under-represented on the committee.[54] Moreover, if the Joint Declaration itself is not a valid agreement, the authority stemming from the Declaration for the enactment of the Basic Law by the PRC is invalid as well.[55]

There is a suggestion that the "high degree of autonomy" as promised by the Joint Declaration actually represents the wishes of the people of Hong Kong. It is not a must to conduct a referendum or plebiscite to ascertain the wishes of the people. The right of self-determination can be said to have been exercised. There is no doubt that the people of Hong Kong do appreciate a "high degree of autonomy" but whether it is the one that has been agreed upon by the PRC and UK remains doubtful.[56]

V. Conclusion

It can be concluded here that the people of Hong Kong should have the right of self-determination. Since the right has not been exercised, according to U.N.G.A. resolution 2625 (XXV), the status of Hong Kong as a non-self governing and colonial territory remains despite the fact that it is going to become a Special Administrative Region after 1997. This suggestion may sound radical but it is not without legal basis.

The Joint Declaration and the Basic Law are being thrust on the people of Hong Kong without any prior genuine consultation. No matter how highly praised the two documents are, they are not the result of a decision of the people of Hong Kong.

Lastly, although there is a tendency to link the right of self-determination to the concept of independence,[57] this is not the only choice that the people of Hong Kong can adopt.[58] What matters, of course, is not what choices the people opt for but whether the right of self-determination as an independent value is being respected and exercised.

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53 Jayawickrama, note 34 above, p. 52; Hannum, note 2 above, p. 149; Amberg, note 6 above, p. 844.
54 Jayawickrama, note 18 above, pp. 95-96.
55 Ibid p. 97.
56 See p. 87 above.
57 Hannum, note 2 above, p. 39.
58 Please see pp. 82-83 above.

THE HISTORY OF THE COURT OF FINAL APPEAL 1988-91

NICKY FINN

The aim of this paper is to look at a period of time in the continuing history of the establishment of the Court of Final Appeal and show how difficult that history has been. The period of reference is from March 1988 to September 1991. This period is one of the hardest times faced by the Hong Kong judiciary in the development of the Court of Final Appeal as there were rumours and suggestions that our legal independence was being used as a pawn in political negotiations. For reasons of judicial erosion and unconstitutional behaviour, this period is an interesting one, the questions of which are still to be resolved.

The Court of Final Appeal started its thorny road of establishment in 1984 as a principle in the Joint Declaration. This initiation into the future of Hong Kong was merely the planting of the desire to move away from the Privy Council in London and create our own final court of appeal. This was not a revolutionary idea, as it had been the direction taken by other countries that had become republics or independent from England.

For countries that are not experiencing something so drastic as a "change of masters" it is a fairly easy process, one that is given support and co-operation by all sectors. However, in Hong Kong we are "changing masters" and those masters are philosophically so far removed from each other that in implementing a court of such stature many difficulties arise. The differing legal philosophies of Britain and China are not the only problem that exists in setting up the Court of Final Appeal. The Court of Final Appeal is only one element in the larger picture of Sino-British negotiations and therefore might become compromised by being traded against other issues. Another difficulty is that there is a strong legal fraternity in Hong Kong, which, though represented by the Bar Association and Law Society, is fractional, with some groups leaning to each of the two sides and with others that have different ideas of what is good for Hong Kong. All these elements remove the simplicity and satisfaction of creating an independent Court of Final Appeal.

The establishment of the Court of Final Appeal remained an unchallenged principle for future implementation until 1988, when China decided to remove itself from the talks on the subject. China stated that it wanted to stop the talks as it felt that discussion of the matter might hamper talks on the Basic Law and give the British "room to influence the drafting of the Basic Law".[1] A Chinese source had stated that "[i]t's better to have discussion after the drafting is finished".[2] 1988 saw the birth of division between Britain and China concerning the Court of Final Appeal. The start of this division was not in itself alarming as it seemed quite harmless and acceptable to postpone the talks until after the promulgation of the Basic Law. (There were still ongoing discussions about provisions in the Basic Law that governed the Regional Courts not having jurisdiction over cases relating to defense, foreign affairs and executive acts of the Central People's Government). It was alarming inasmuch as it was an open statement that the Court of Final Appeal was part of the negotiating structure of the whole talks and not an entity in itself. This did not stop Britain from openly expressing the wish that the court be set-up by 1992,[3] so that it might gain respect and acceptance before 1997 and thereby be strong enough to cope with the transition of controlling governments.

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* LLB, visiting student at the University of Hong Kong.

1 *Hong Kong Standard* 12/3/1988.

2 *Hong Kong Standard* 12/3/1988.

3 *South China Morning Post* 5/11/1988.

The hesitation of 1988 was corrected in March of 1989 when China decided to soften its stance on the talks about the Court of Final Appeal and agreed to work out details of "the plan at expert level as the worry over the convergence with the Basic Law was no longer a problem".[4] This was only after there had been major amendments to the previous problem areas of the Basic Law. These amendments had sought to clarify the problem of the Hong Kong courts and China's influence over them through interpretation of "Acts of State" and "Facts of State".[5] Britain used this "softening" to reiterate its desire to have the court in place by 1992 or 1993. China at this point became reluctant to commit itself and merely commented that "the Chinese side is sticking to its position that the Court of Final Appeal should not be instituted before the Basic Law is promulgated next year".[6]

What had just occurred was the parturition of political congestion that has provided many different chapters of deadlock and impasse over the last six years. The next domino in the Court of Final Appeal saga emerged in the form of a statement from Mr. Andrew Wong Wang-fat (who at the time headed the now defunct Omelco Constitutional Development Panel). Mr. Wong raised the issue of Article 157 of the Basic Law, which defines the amount of interpretation that the National People's Congress Standing Committee can exercise in the Court of Final Appeal of the HKSAR. Mr. Wong perceived that the Court of Final Appeal of the HKSAR should be given the ability to "interpret all the articles of the Basic Law".[7] This is an indication of the difference of legal philosophy about the control of courts held by the Chinese and Hong Kong. Obviously, the Chinese government perceived that the ability to interfere was necessary, while Mr. Wong felt that the Court should be independent and safeguarded, as a Hong Kong court, free from distant intervention. This is a constitutional question that deals with the differences between Democratic and Communistic theories. More democratic countries see that there is a need for a system of checks and balances that are supported by an independent judicial system to ensure its integrity, while Communism displays a central government theme that has its own checks and balances in which the courts are not used for that purpose. Rather, they are there to discipline and to aid in the following of the directives of a central committee for the greater good of the nation. This exemplifies the fear that exists with the takeover of Hongkong; that there will be a substantive move away from the independence of the judiciary and that it will become influenced to such a degree as to remove it from its role as an impartial body for the revision and interpretation of laws and statutes. This fear, combined with a lack of confidence in the secret Joint Liaison Group meetings and their politicising of the issue, were distinct reasons for Hong Kong's political and pressure groups' entering into the fray. It would not be acceptable to allow Britain to compromise the legitimacy of the Hong Kong legal system for consideration on other issues.

Despite the questions raised by Mr. Wong and other members of Omelco, China and Britain seemed to be on good terms concerning the establishment of the Court of Final Appeal. August of 1990 saw Brian Suttil heading up the British side of the expert talks on the matter and Mr. Zheng Weirong leading the Chinese side with Mr. Wu Jianfan joining him on his team. This was also the first time that the problem of a lack of senior local Chinese judges (which could force the same person to become the Head of the Court of Final Appeal and the High Court) was raised. Article 90 of the Basic Law provides that "[t]he Chief Justice

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4 *Hong Kong Standard* 6/3/1989.

5 The scope of this note precludes an in depth discussion of this topic. For further analysis, please see E.S.C. Wade, *Constitutional and Administrative Law* (London: Longman, 1985).

6 *South China Morning Post* 23/3/1989. (anonymous source)

7 *South China Morning Post* 19/4/1989

of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country". This seems to indicate that there should be different people appointed to the two posts, but it would also seem that the demand is greater than supply.

Talks continued through the latter part of the same year, 1990, culminating in December with the announcement that preparations for the establishment of the Court of Final Appeal would begin later in the same month. Mr. Zheng Weirong stated that "[w]e have reached consensus and shared many close views on many key issues"[8] and a source from the British team said that "[t]here is no big deal with the date now that we have agreed that it should be set up well before 1997. Whether it is before 1992 or 1991 makes little difference". This would seem to display a show of solidarity between the two teams not previously seen and that the Court of Final Appeal would exist in the near future. This, however, was not the case.

In April of the following year Chief Justice T. L. Yang announced that due to Chinese reservations on the issue the court may be delayed until 1994.[9] This was said to be due not to any disagreement but because the Chinese side needed more preparation time. The Chief Justice also stated that he felt that for the Court to be able to function properly after 1997 it could not be set up any later than 1994.[10] The Court of Final Appeal had been the closest that it had ever been to being set up and then the rug was pulled out from underneath it.

The people of Hong Kong had placed great trust in the members of the Joint Liaison Group and at this point one might wonder what was happening. As the Court of Final Appeal was only part of the larger negotiation process, one might wonder whether it had been used as a commodity to be traded for results in another area or used as a sign of power. These thoughts are only for the most cynically minded, but the Joint Liaison Group meetings and the expert talks were held in secret and the issues that they revolved around were political negotiations and therefore subject to compromise and bluff. The problem of the High Court Judges not having the requirements of experience and Chinese nationality existed, but this was evident back in December of the previous year when China agreed to the Court of Final Appeal having an imminent future. Had one of the sides, or both, used the Court of Final Appeal for political strategy?

Hong Kong's legal bodies approached this new frustration by examining the situation in a practical manner devoid of political necessity or want. Mr. Justice Anthony Rogers, (who was the then Chairman of the Bar), spoke out in a speech at Law Week April 1990. Mr. Justice Rogers said that the provision in the Basic Law that dealt with the Chief Judge being a Chinese national was unnecessary and queried the relevance of giving the Standing Committee power to interpret the Basic Law. Mr. Justice Rogers brought what was not being said publicly into the public when he stated that "[o]ne has to ask why there has to be any delay". He went on to say that "[o]ne thing that may emerge is that the same person will have to hold both posts", a reference to the issue of there not being enough qualified judges to occupy the separate roles of Chief justice of the High Court and Chief Justice of the Court of Final Appeal. Mr. Justice Rogers did not stop at showing the Bar's response to the problems that existed, and went on to warn both governments about the power of

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8 *South China Morning Post* 5/12/90.
9 *Hong Kong Standard* 8/4/91.
10 *Hong Kong Standard* 8/4/91.

interpretation of the Basic Law by the National Peoples' Congress after the take over in 1997:

> [u]nder the common law only the courts are entitled to interpret laws. If a law-making body such as the Legislative Council in Hong Kong does not approve of the way a law which it has passed has been interpreted, the way open for it is to change the law. It is quite wrong for the Legislative Council or any other political body to try to interpret the law. It is only if this rule is enforced that strict judicial independence can be observed and certainty in the law can be maintained.

Mr. Justice Rogers then drew attention to the fact that the situation had been adversely commented upon by the United Nations Human Rights Committee and that they felt that the provisions regarding interpretation affected the "high degree of autonomy" to which Hong Kong was entitled under the Joint Declaration and could have a serious impact on matters such as judicial independence, which we regard as fundamental to our system of law. He then noted that Britain itself had already been successfully taken to the European Court of Human Rights and that Johannes Chan had represented the Bar with its submissions to the United Nations Committee.

The then Chairman of the Bar's speech gave the impression that the Hong Kong Bar Association was not going to be fooled by the actions of the Joint Liaison Group. Though the speech was thought to be extreme at the time it did not compare to a later speech made by Mr. Justice Rogers on 19 April at the Kowloon Rotary Club. Mr. Justice Rogers blamed the Joint Liaison Group and the Judicial Services Commission for "whittling away" at the powers of the Court of Final Appeal. (There had been changes suggested which departed from what was originally decided in the Joint Declaration and the Basic Law, and Mr. Justice Rogers felt that the present legal system would not be able to survive if the Court of Final Appeal was set up with the suggested changes. Also, an increase in the number of Government members to the Judicial Services Commission[11] now meant that the Government could overrule the Bar and the Judiciary in the appointment of judges.) In the same speech he said that "the secrecy surrounding the Joint Liaison Group discussions . . . gives rise to suspicions of further undesirable changes".

The establishment of the Court of Final Appeal had followed all the rules of political and public courtesy, but if one were to read between the lines it was obvious that groups such as the Bar Association, the Law Society and the British Chamber of Commerce (the latter two of which had publicly supported some of the Bar Chairman's statements) had now become extremely worried about the direction of Hong Kong's legal system and the impact that it would have on the future of Hong Kong. It was also clear that the Joint Liaison Group were no longer as trusted as they once were and that their actions, as with those of China, would now be viewed with suspicion as perhaps not being those desired by the people of Hong Kong.

An article in the *South China Morning Post*[12] gave a "prominent lawyer's" "cynical" theory that the Court of Final Appeal might have been held "hostage to intermittent airport negotiations and political wrangles on the wider Sino-British horizon". Another "senior legal source" explained that "since June 4, Hong Kong is being used by China as a political

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[11] From two to three. The Judicial Services Commission approves the nomination of judges.

[12] 13/9/91.

instrument to improve Western relations with the present regime in China".[13] The Joint Liaison Group was intended to act as an "organ of liaison, not an organ of power",[14] yet the Court of Final Appeal, which is an imperative part of the legal future of Hong Kong, has experienced numerous comings and goings all pointing to something more than mere liaison occurring within the Joint Liaison Group. This type of speculation is very unsettling as the future of Hong Kong rests in the hands of these Sino-British relationships. The Court of Final Appeal was laid out in the Joint Declaration, yet it has succumbed to a lengthy period of political parrying. Its implementation was not necessarily meant to be smooth; however it was also not meant to become an arena for speculations over the actions of those with whom Hong Kong's future lies.

The issues surrounding the establishment of the Court of Final Appeal have not yet been settled. The period that has just been described took place three years ago, but it was perhaps the most unsettled time of the recent history of the Court of Final Appeal. It is unsettling because it suggests that the independence of the judiciary was open to erosion for political ends, and that Hong Kong's constitutional security was merely a tool for the two sides during the negotiations. Only speculations can be made, as the contents of the talks in the Joint Liaison Group are secret. The question, however, remains as to why something as promising and necessary as the Court of Final Appeal should have been associated with so much difficulty and controversy.

The future of the Court of Final Appeal is not yet settled. It has been more than three years since the first date put forward for its establishment and it is less than three years away from 1997. The question that must now arise is whether or not the Court will be able to establish itself properly before China takes the helm of Hong Kong. If not, the judicial integrity of all the courts below must also falter, thereby giving China a greater ability to influence and interpret laws, leaving us with a situation that no democratic ideal of direct elections could solve.[15] Is it too risky now to establish a court that both the Chief Justice and the then Chairman of the Bar said would not be feasible after 1994? What other choice remains if we are to leave Britain's judicial brotherhood in 1997? The new difficulties are whether it is too late to establish that which must be established, and when it is established, how it will affect the judicial strength and independence of Hong Kong.

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[13] Ibid.

[14] Ibid.

[15] One of Governor Patten's explanations for the necessity of his 1992 electoral reforms was that a more representative legislature can provide a system of checks and balances (see p. 90 above). But if the judiciary is not truly independent from Beijing, whether or not Hong Kong's legislature is democratically elected is irrelevant.

RESOLUTION OF PROPERTY RIGHT DISPUTES OVER MATRIMONIAL HOMES IN THE PUBLIC SECTOR

GARY LAM*

I. Introduction

According to government statistics, there were some 3,000,000 people in Hong Kong residing in public housing estates[1] in 1993. Out of those 3,000,000 people, nearly 2,500,000 were living in rented flats which are owned and managed by the Housing Authority (the "Authority") whilst the remaining 500,000 were in purchased flats of the Home Ownership Scheme ("HOS") which is also administered by the Authority.[2] As a fact of life, legal issues, such as divorce and subsequent settlement of property disputes over matrimonial homes, are bound to arise involving married couples who are tenants or occupants of public housing units. It is submitted that the laws which govern marital disputes over rights in matrimonial homes in the private sector are well developed at the present stage as it is an area which has often been litigated. On the contrary, legal issues relating to property right disputes over matrimonial homes in the public sector are not as frequently litigated. Owing to Hong Kong's unique socio-economic structure and problems in housing shortage, where almost one-half of its population is currently living in public housing, it would be useful to explore the law which governs disputes between divorced couples concerning matrimonial homes in the public sector.

This paper is divided into two parts: the first part focuses mainly on marital rights in relation to tenancies in public housing estates, which include rights beyond proprietary interests such as ancillary relief; the second part then deals with spouses' ownership rights in flats purchased under the HOS.

II. Power of the Court

Both s 24 of the Matrimonial Causes Act 1973 and its Hong Kong counterpart, s 6 of the Matrimonial Proceedings and Property Ordinance[3] (referred to as Cap. 192 hereafter), empower the court to make orders for transfer or settlement of matrimonial property on granting of decrees of divorce, nullity of marriage or judicial separation. In theory, it has been established by English cases such as *Hale v. Hale*[4] and *Thompson v. Thompson*[5] that "property" may include a lease or tenancy for the purpose of s 24 of the Matrimonial Causes Act 1973 so long as there is no contractual or statutory provision which prevents such tenancy from being transferred by the tenant himself. It was also held in *Thompson* that even a

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* BSc, LLB (HKU), ACIArb. The author wishes to express his deepest gratitude to Dr. Bart Rwezaura and Miss Lusina Ho of the Faculty of Law at the University of Hong Kong for their encouragement and guidance throughout the process of completing this paper.

1 Public housing in this context refers to flats leased out or sold out under management of the Housing Authority.

2 Hugh Witt (ed.), *Hong Kong 1993* (Hong Kong: Government Printer), p. 168.

3 Cap. 192, LHK.

4 [1975] 2 All ER 1090, p. 1094, per Megal LJ.

5 [1976] Fam 25, p. 29.

tenancy of a local authority house was considered "property" over which a court had jurisdiction to order a transfer under s 24 of the 1973 Act.[6]

In practice, however, the court is often reluctant to make an order of transfer of tenancy since doing so could be regarded as an interference with the statutory duties and discretion of the local authority.[7] In *Regan v. Regan*[8], Sir George Baker held that housing was a matter for the local authority and that the policy of the authority was to keep the sitting tenant unless there were children involved. Under such circumstances, the local authority would then award the tenancy to the party having custody for the protection of the children. The Housing Act 1980 gives tenants of public sector housing a degree of security of tenure by restricting the power of the local authority to remove the tenant party (usually the husband) from council property and re-let it to the non-tenant party (usually the wife). As a result, the practice of English courts has been to allow local housing authorities to exercise their own discretion in matters of transfer of tenancies without pressure from the court.[9]

The position taken by Hong Kong courts can be found in *Wong Tai-hing v. Wong Lau Yuk-ling*.[10] In that case, the court considered whether it had power to allow an application for a transfer of the tenancy of a public housing unit from the registered tenant who was the petitioner of a divorce suit to the respondent. His Honour Judge Caird followed the decisions in *Hale* and *Thompson* that a tenancy with the then Housing Department was considered "property" within the meaning of s 6 of the Matrimonial Proceedings and Property Ordinance. The learned judge further stated that although the court was competent to make orders of transfer of the said tenancies, the court should properly "hesitate for a very long time" before making an order involving public housing units owned by the Housing Department. In other words, the court's power to order a transfer of tenancy of a public housing unit is "subject to the consent of the Housing Authority". The learned judge continued to point out that the acceptable practice was for the solicitors concerned to apply for consent from the proper authority prior to presenting the application to the court.

Ten years later in *Chan Wei-yin v. Cheong Shun-chiu*[11], which involved the same issue as *Wong v. Wong*, Litton, J.A. accepted the established legal principle that a tenancy, which had no restriction on transfer, could be the subject of an order for transfer of property directed to the parties of a divorce under s 6 of Cap. 192 by the time the court granted a decree. His Lordship, however, found that the court had no jurisdiction under s 6 to make such an order or even a mere "recommendation" to the Housing Authority with respect to a transfer of tenancy. His Lordship also indicated that the power of control and management of housing estates was vested in the Housing Authority by virtue of Part IV of the Housing Ordinance[12] and that the court would respect the autonomy of the Authority. Furthermore, s 19(3) specifically states that the court has no jurisdiction to hear any application for relief by or on behalf of a person whose lease has been terminated. His Lordship was of the view that the making of an order for transfer or recommendation to the Authority by the court would require the termination of one party's tenancy and the granting of a new one to the

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6 Ibid.

7 Ibid.

8 [1977] 1 WLR 84, pp. 86-7.

9 Leonard Pegg, *Family Law in Hong Kong* (Singapore: Butterworths, 1986), p. 142.

10 District Court, Divorce Jurisdiction, Action No. 776 of 1983.

11 Court of Appeal, Civil Appeals, No. 67 of 1993.

12 Cap. 283, LHK.

other; doing so would undoubtedly be an interference of the exercise of the Authority's discretion under s 19.

Although *Wong v. Wong* appears to have been overruled by *Chan v. Cheong* since the former did not explicitly deny the court's power to make orders for transfer, in theory the two cases do follow the same line of reasoning. The learned judge in the *Wong* case expressed his strong reluctance to make the order because doing so would unavoidably interfere with the Housing Authority's executive power and such an order made by the court was subject to the consent of the Authority. Similarly, Litton, J.A. in the *Chan* case did not rule out the possibility that the court could make a "transfer of property" order under s 6 of Cap. 192 in consultation with the Authority. Therefore, according to the two cases, the essence of seeking a transfer of tenancy in public housing is to gain approval of the Authority.

In addition to the primary issue concerning the court's power to make orders of transfer of tenancy of public housing units, Litton, J.A. in *Chan* has left a rather critical secondary issue open: does the court have the power to order the tenant party to make an application to the Housing Authority to have the tenancy transferred to the non-tenant party? It is submitted that the non-assignment clause in the Authority's standard tenancy agreement would prevent the court from applying s 6 of Cap. 192 since His Lordship has stated that the validity of a court order made under the same provision is subject to any restriction on transfer stipulated in the tenancy. Therefore, it is clear that the court has no jurisdiction to order the Authority to make a transfer of tenancy. In fact, even the Authority cannot, on its own motion, consider a case of transfer without the tenant actually making an application. Such a technical issue could be of particular importance when the tenant is unwilling to move out of the housing unit. His Lordship seemed to have suggested in the same judgment a rather burdensome solution to this problem:

> If the wife wants to contend that the husband has two homes available to him and that an order should be made by the court under s 6 of the Matrimonial Proceedings and Property Ordinance requiring the husband to transfer the tenancy of Room 3615 to the wife, then she must adduce evidence, perhaps by taking out a witness summons directed to the Housing Authority, to satisfy the court that the terms of that tenancy enable such order effectively to be made. The question of "transfer", what form such "transfer" can take, can only be resolved by evidence concerning the policy and practice of the Housing Authority.[13]

It is submitted that it would undoubtedly be too costly for the wife to comply with the practice set forth by His Lordship simply to secure a tenancy of a public housing unit. In reality, the Housing Authority may not be willing and ready to give evidence in open court revealing its own policy and practice. There ought to be a less expensive and more expeditious way for the more vulnerable and economically weaker party to seek relief for housing accommodation in divorce proceedings.

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[13] See note 11 above.

III. Policies and Practices of the Housing Authority

In every standard tenancy agreement prescribed by the Housing Authority, there is a non-assignment clause against the tenants unless the Authority's approval has been granted:

> Not to assign sub-let or part with the possession of the said flat or any part thereof or permit any person (other than a member of the Tenant's family as listed hereon, which list may not be altered or varied without the Landlord's approval) to occupy the same or any part thereof as a lodger or paying guest or in any other manner whatsoever. It is expressly agreed that all family members listed shall take up and retain permanent residence in the premises within one month after the commencement of the tenancy.[14]

As indicated in both *Wong* and *Chan*, whether a transfer of tenancy can be made is subject to the policy and practice of the Authority. According to a senior staff member of the Authority, when considering applications of transfer of tenancy in divorce cases, the Authority will assess the hardship experienced by both parties, i.e. which party has a greater need to remain in the housing unit.[15] As a matter of practice, the tenancy will normally be given to the party who has custody of the children. However, that is not always so as shown in *Chan*. In that case, the husband was a long-standing tenant with an aged and handicapped mother. Although the wife had been awarded custody of the children and was at the time living with her children in a premises owned by her mother, the application to transfer the tenancy to her was refused because this would result in the eviction of the husband and his mother which might in turn "cause a great deal of unease, and possible unrest and disturbance amongst the neighbouring tenants in the estate."[16]

In the meantime, the Housing Authority cannot terminate a lease without a reasonable ground. In the UK, s 19(1) of the Landlord and Tenant Act 1927 provides that, whenever there is, in the tenancy agreement, a covenant against assignment, subletting, or parting with possession "without licence or consent given by the landlord", the covenant is deemed to be subject to a proviso that the license or consent should not be unreasonably withheld.[17] The test of whether the consent has been reasonably withheld by the landlord is an objective one.[18] As long as the landlord has acted as a reasonable man would have in the same position in refusing to consent, the refusal will be upheld.[19] Despite the fact that there is no such provision in Hong Kong, Litton, J.A. in *Chan* has pointed out that when exercising its statutory powers to terminate a lease under Part IV of the Housing Ordinance, the Authority must do so fairly and objectively in accordance with its own policy guidelines. An aggrieved party may seek judicial review of the Authority's decision pursuant to Order 53 of the Rules of the Supreme Court on the grounds of illegality, irrationality or procedural impropriety.[20]

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14 Clause 2(s) of a standard form of tenancy agreement of the Housing Authority.

15 Per Mr. H. N. Wong of the Housing Authority in a telephone interview with the author.

16 See note 8 above, per Caird, J.

17 J.G. Riddall, *Introduction to Land Law* (London: Butterworths, 1988), p. 277.

18 P. F. Smith, *Evans: The Law of Landlord and Tenant* (London: Butterworths, 1985), p. 141.

19 Ibid, p. 142.

20 Per Lord Diplock, in *Council of Civil Service Unions v. Minister for the Civil Services* [1985] AC 374, pp. 410-1

Even in cases where a single divorced person has been evicted from a public housing unit, the obligation of the Housing Authority towards that person does not end there. The Authority has a policy of setting aside an annual compassionate rehousing quota of 100 flats for the grant of conditional tenancy to the party with dependent children while awaiting the award of divorce decree and custody of children. The said policy also provides for parties not being granted custody of children an option to apply for rehousing on homeless grounds through the waiting list.[21] In a meeting held by the Authority's Management and Operation Committee on 23 January 1992, the Committee reviewed its policy dealing with tenancies of divorced couples in public housing estates, and reviewed and endorsed a proposal that the divorcees displaced from public housing be given a credit of waiting time equivalent to the length of their former tenancies up to a maximum of three years on the Single Person Waiting List.[22] Additionally, the Authority maintains a practice of offering assistance and advice to its tenants with marital problems. Temporary accommodation in refuge homes to those in separation cases may be offered if circumstances do require.[23]

IV. Flats Purchased under the Home Ownership Scheme

With respect to flats purchased under the Home Ownership Scheme, it is submitted that such premises should be dealt with as property in the private sector. Therefore, the court should have power to make orders of transfer or settlement of such property under s 6 of Cap. 192, although it is doubtful as to the court's jurisdiction to order sale of the matrimonial home.[24] On the other hand, there are certain restrictions imposed on the reselling of the flats purchased under the HOS by the Housing Authority. It is submitted that when making an order of transfer or settlement of property, the court should ascertain that prior approval from the Authority has been obtained by the owner of the flat.[25] The Authority would not normally object to an application of transfer or sale of the property provided that the five-year limitation period has expired and that the Authority is satisfied that the owner will not obtain any benefits from such transaction.[26]

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21 Internal policy guidelines of the Housing Authority titled as *Review on Rehousing Policy for Divorced Couples* dated 30 January 1993.

22 Internal policy guidelines of the Housing Authority titled as *Tenancies of Divorced Couples in Public Housing Estates* dated February 1992.

23 See note 15 above.

24 Per Clough, J.A. in *Cheung Wong Kim-ching, Esther v. Cheung Chai-kong* [1991] 1 HKLR 704; also per Power, J. in *Chan Cheung-hing v. Chan Tang Lan*, Divorce Jurisdiction, High Court, No. 35 of 1981.

25 Art. 21(b), Guide to the Home Ownership Scheme Phase VIIB.

26 See note 15 above.

THE RECEPTION OF ENGLISH LAW IN COLONIAL HONG KONG AND THE HONG KONG SPECIAL ADMINISTRATIVE REGION

STEPHEN LAW SHING-YAN*

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.[1]

I. Introduction

On 1 July 1997, imperial legislation (i.e., Orders-in-Council or UK Acts extended to Hong Kong) will cease to apply in the Hong Kong Special Administrative Region (HKSAR).[2] Owing to the intimate and inseparable relationship between statutory law and common law,[3] it would be extremely difficult, if not impossible, to preserve the integrity of common law while discontinuing the application of imperial legislation. In the meantime, as the Standing Committee of the National People's Congress (SCNPC) retains the power to declare laws previously in force to be in contravention of the Basic Law,[4] the extent to which common law will be applied is still unpredictable. The intention of this paper is twofold: first, to simplify the technicalities involved in the application of English Law in Hong Kong, and second, to analyze the post-1997 situation. It commences with a brief review of the various formulas of the application of English law in the territory and the resulting interaction between common law and statutory law;[5] then it discusses how the interaction will affect the application of common law after the transfer of sovereignty.

II. The Application of English Law in Hong Kong[6]

A. Old Formula - (1843 - 1966)

Under this formula, the application of English Law was mainly provided for in the s 5 of the Supreme Court Ordinance (Cap. 4) 1873:

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* Second year law student. The author wishes to thank Professor Peter Wesley-Smith and Dr. Nihal Jayawickrama for their valuable comments on the earlier draft of this paper.

1 Article 8 of the Basic Law.

2 Both the Sino-British Joint Declaration (Part II, Annex I) and the Basic Law (Article 8) provide for the continued effectiveness only of the common law, rules of equity, ordinances, subordinate legislation and customary law.

3 Common law in this context refers to case law and non-statutory law. It includes common law rules and rules of equity.

4 Article 160 of the Basic Law.

5 A detailed examination of the reception of English law is found in Professor Peter Wesley-Smith's articles "The Reception of English Law in Hong Kong" (1988) 18 HKLJ 183 & "The Effect of Pre-1843 Acts of Parliament in Hong Kong" (1984) 14 HKLJ 142.

6 This section is an abridgement of Peter Wesley-Smith's arguments in the article, "The Effect of Pre-1843 Acts of Parliament in Hong Kong", ibid.

> such of the laws of England as existed when the colony obtained a local legislature, that is to say, on the 5th day of April, 1843, shall be in force in the Colony, except so far as the said laws are inapplicable to the local circumstances of the Colony or of its inhabitants, and except so far as they have been modified by laws passed by the said legislature.

There was no distinction between common law and statutory law. To determine what law was in force in the territory, one could simply look to English law as it had existed on 5 April 1843. Acts of Parliament which were in effect in England on the cut-off day, and not unsuited to the situations of Hong Kong, applied automatically. Acts passed on any subsequent day were not part of Hong Kong law unless extended to the colony by their own terms or by other competent legislation.

Common law which appeared to have been created after the cut-off date, that is 5 April 1843, was nevertheless in force in Hong Kong owing to the declaratory theory that the common law may develop but does not change.[7] Common law before the reception date is the same as that after the cut-off date, except where there is a statutory alteration.

But after 120 years this methodology grew increasingly difficult. It had become a tedious and prolonged job to discover what the laws of England in 1843 were. Simplification of the procedure was therefore necessary.

B. New Formula - (1966 - 1971)

Section 5 of the Supreme Court Ordinance was repealed by the Application of English Law Ordinance 1966 (AOELO) (Cap. 88). The two main goals were to bring the common law up to date[8] and to facilitate legal research by specifying what imperial Acts are to be applied in the territory. It included the following stipulations:

First, by s 3, the common law and the rules of equity were to be in force subject to their applicability to local circumstances, modification (presumably by the courts), and modification or exclusion by any Ordinance, Order in Council or Act which applied to Hong Kong. That means the cut-off date of 5 April 1843 was deleted.

Second, by s 4, Acts of Parliament were to be in force only if specified in the schedule (which could be amended by the Legco and which contained only pre-1843 Acts) or by virtue of their own terms or other legislation. Therefore, a lawyer need only consult the schedule to the Ordinance and the appendices of the Laws of Hong Kong[9] to discover all applicable imperial statutes.

However, the simplification was not effective at all, creating more problems than it solved. An immediate question arose in the case of imperial Acts which were enacted *after* 5 April 1843 but not applicable to Hong Kong that repealed a common law rule. Bear in mind that a statutory alteration would result in a change in common law; the repeal of a common law rule (by legislation) means that that rule no longer exists in the common law. A new

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7 For a detailed discussion of the declaratory theory, see pp. 107-8 below.

8 I was advised by Professor Wesley-Smith that the issue debated after the *Gensburger* (see note 10 below) case was precisely whether it was the intention of Cap. 88 to bring the common law up to date, but thus far it is not entirely clear. He said the only, or at least primary, reason given by the government at the time was the facilitation of research. But Pickering J, in *Gensburger* (see note 10 below), was of the view that s 3 of the AOELO "brought the reference to the Common Law up to date..."

9 It lists all the currently applicable imperial Acts.

common law rule is in fact generated. Since the inapplicable imperial Act which repealed the old common law was enacted after the cut-off day and the aim of the AOELO is to bring common law up to date, the question arises: should the new common law rule apply even if the imperial Act which created it did not?

The problem was well illustrated in *Gensburger v. Gensburger*[10] -- There was an old common law rule called criminal conversation ("crim con") in which a co-respondent in a divorce action could be ordered to pay damages to the husband. That rule had been repealed in England by the Matrimonial Causes Act 1857, but the Act had never been extended to Hong Kong. Under the *old formula*, the old common law rule should have been applied since it was part of English law on 5 April 1843. But according to the *new formula*, Pickering J in the Full Court said that the effect of the AOELO, that is omission of the cut-off date, was to apply the up-to-date common law in Hong Kong. Since crim con had been abolished in England, it was not part of English common law. Thus, it could not be received in Hong Kong.

The decision was significant and described as "calculated, if taken seriously, to bring Hong Kong's law into total confusion".[11] In fact, the Matrimonial Causes Act 1857 was not intended to be extended to Hong Kong. But unfortunately, owing to its interaction with the common law, the Act was indirectly transplanted into the colony. Should such a decision be followed, many imperial Acts which were not intended to be applicable to Hong Kong, would indirectly be imported to the territory through their interaction with the common law. Since almost all UK Acts could apply to Hong Kong through common law, there was no need for s 4.

Therefore, the Application of English Law Ordinance was amended in 1971.

C. Latest Formula - (1971 - Present)

The words of the explanatory memorandum provide that "common law and equity, in their application to Hong Kong, should not be affected by English enactments which are not specifically applied to Hong Kong."[12] Section 3 of the original Ordinance was accordingly repealed and replaced. The current edition reads:

> (1) The common law and the rules of equity shall be in force in Hong Kong--
>
> (a) so far as they are applicable to the circumstances of Hong Kong or its inhabitants;
>
> (b) subject to such modifications as such circumstances may require;
>
> (c) subject to any amendment thereof (whenever made) by--
>
> (i) any Order in Council which applied to Hong Kong;
>
> (ii) any Act which applies to Hong Kong;
>
> (iii) any Ordinance;
>
> (2) The common law and the rules of equity shall be in force in Hong Kong as provided in subsection (1) notwithstanding any amendment

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10 [1968] HKLR 403.

11 (1972) 2 HKLJ 115.

12 Hong Kong Hansard, Session 1971/72, p. 100.

> thereof as part of the law of England made at any time by an Order in Council or Act which does not apply to Hong Kong.

Although subsection (2) was specifically drafted to solve the problem which arose in *Gensburger*, it has not been fully solved. Hong Kong is still applying some outdated common law rules.

Since the subsection stipulates that the application of common law in the territory should not be disturbed by any alteration made by any inapplicable imperial legislation, a tricky problem arises: could an old common law rule -- which had already been abolished by an Act of Parliament before April 1843, but that Act was not listed in the schedule to the AOELO -- be revived ?

An illustration of this problem can be found in the case of *Tang Kai-chung v. Tang Chik-shang*.[13] (Though this case pre-dated the 1971 amendment, it still has illustrative relevance because the court, in that case, did not refer to *Gensburger* and apparently took a similar view of the 1971 amendment). The case concerned the writ of partition. The common law writ of partition had been abolished by an Act of Parliament in 1833. Under the *old formula*, the Act would take direct effect in the territory since all pre-1843 imperial Acts applied in Hong Kong subject to the aforementioned exceptions. But it was held that, under the post-1966 formula, the Act no longer applied since it was not listed in the schedule of the AOELO. So, although the writ of partition had never been part of Hong Kong law, the plaintiff was permitted to proceed with his writ. The common law writ of partition was introduced into Hong Kong as a result of s 3(2) of the AOELO.

The decision had far-reaching effects. Many areas of modern Hong Kong law were suddenly replaced by common law rules which were perhaps centuries old.

A solution was eventually found in *Oceania Manufacturing Co v. Pang Kwong-hon*.[14] In this case, the question involved the old common law obligation of attornment (a formal acknowledgement of one's tenancy) which had been effectively abolished in England by the Administration of Justice Act 1705. However, the 1705 Act was not scheduled under Cap. 88. Under the *old formula*, it is certain that attornment was not part of Hong Kong law. But under the AOELO, it was argued that attornment was necessarily part of Hong Kong law. In fact, if the reasoning in *Tang Kai-chung* were true, attornment would have been revived.

Roberts C.J. dealt with this troublesome question by applying s 23(a) of the Interpretation and General Clauses Ordinance (IGCO)[15]:

> Where an Ordinance repeals in whole or in part any other Ordinance, the repeal shall not - (a) revive anything not in force or existing at the time at which the repeal takes effect . . . .

At the time when s 5 of the Supreme Court Ordinance was repealed by the AOELO, attornment was not an obligation existing or in force in Hong Kong law. Therefore the old common law rule of attornment could not be revived. It follows that attornment would not exist in Hong Kong and that the common law which existed at the time of repeal continued to be applied. In other words, the 1705 Act, though not scheduled, is still having an effect,

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[13] [1970] HKLR 276.
[14] [1979] HKLR 445.
[15] Cap 1, LHK 1989 ed.

albeit indirectly, through common law. The same applies to other imperial Acts which were made before 5 April 1843 and had since then been repealed or excluded from the schedule of the AOELO.

The *Oceania* solution seems to offer an ephemeral cure-all to the disorder caused by *Tang Kai-chung*, but the root problems remain intact.

First, there is a question of the applicability of s 23(a): does it apply in respect of every Act of Parliament which impinges upon the common law? Bear in mind that s 23(a) refers only to the non-revival of something not in force or existing at the time of the repeal. This provision does not apply, however, to something which is still, in some form or another, in force or existing. The position therefore becomes extremely complicated as one would have to examine what effect a statute has on common law -- whether a common law rule is repealed entirely, repealed in part, modified, extended or so on. For example, the extending or assisting provisions of an unscheduled statute which extended or assisted the operation of a common law rule would cease to have effect, while the original common law would continue to apply. This is because the original common law principle is still existing or in force at the time of repeal. In addition, the interpretation of ambiguous terms such as "repeal", "abrogate", "abolish", "assist", "extend", and "modify" would also be a vexed question.

Second, the reception date, the abolition of which was the major point of the AOELO, is still relevant. Abrogating or restricting statutes existing under English law on 5 April 1843 which were part of Hong Kong law under the *old formula* still have an indirect application here. They may not be in force, but they still continue to have effect through their interaction with the common law since no abrogated or restricted law of England prior to 5 April 1843 is revived by the AOELO. The consequence is clearly contrary to s 3(2) of the AOELO since English common law and equity in force in Hong Kong can be affected by imperial legislation which does not now apply to Hong Kong.

The object of the AOELO -- to simplify legal research -- has not been achieved. It remains, in theory, necessary to consider the whole of English law as it existed on 5 April 1843 in order to determine what the modern law of Hong Kong is. There is an additional job of examining each Act of Parliament to discover its effect on the common law. The terms of a limiting statute must be known because they continue to have an indirect application to Hong Kong. The terms of an extending statute must also be known in order to identify the common law at the time the statute was enacted, since it is that common law which has to be revived. Legal research now has become more complicated than it was under the pre-1966 formula (*old formula*) for the application of English law.

Section 3(2) has only a rather restricted meaning. It is only concerned with imperial statutes passed after 5 April 1843 or to earlier legislation which was never in force here or, if in force, which had the effect of extending existing precepts or creating new law. The schedule of AOELO that lists statutes which abolished or limited common law achieves nothing since these statutes take effect here anyway; to amend the schedule to omit such statutes is of no use since they will continue to apply, though indirectly.

Third, the above conclusion is based on an assumption that *Oceania* was correctly decided. Was it? One could argue that the special provision of s 3(2) of AOELO should prevail over the general provision of s 23(a) of IGCO, and therefore that applying s 23(a) to *Oceania* situation is contrary to the intention of enacting the AOELO.[16]

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[16] This argument was raised by Johannes Chan in a private conversation with the author.

In short, many of these problems remain academic, as the decision in *Oceania* has been ignored in legal practice, largely because it is too complicated!

III. The Reception of English Law in the HKSAR

The basic principles about the application of English law after 1997 include the continuous application of common law (common law rules and rules of equity) and the discontinued application of imperial legislation.

A. Discontinued Application of Imperial Legislation

The immediate effect is that the AOELO will become superfluous and automatically cease to have effect (except s 3 which defines the application of common law and equity which will be maintained after 1997), as the main purpose of the Ordinance is to govern which English law is to be applied in the colony.[17] The imperial Acts contained in the Schedule will therefore cease to apply. Since the continuous operation of these imperial Acts is essential to the stability and prosperity of the HKSAR, localisation of these Acts is very compelling. To ensure that the amended legislation can converge with the Basic Law, the Government has decided to "consult" the Chinese Government through the Sino-British Joint Liaison Group (JLG) on each piece of legislation. But to the Chinese Government, "consultation" means more than just being kept informed -- where there is a difference of opinion, there should be negotiations between the Chinese and British governments until agreement is finally reached, and no action is to be taken by the Hong Kong government until there is agreement. That is to say, the Chinese Government should have a veto power on all important matters.[18] So far, the pace of localising these imperial Acts is terribly slow.[19] To a large degree, it can be attributed to the political stalemate between the Chinese and British Governments concerning the future stoves of the territory, resulting in the slow progress of JLG's talks and decisions. Johannes Chan, in an unpublished paper entitled "A Constitution in Transition: Ten Years From the Sino-British Joint Declaration" provides an alternative explanation:

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[17] But one may argue that imperial Acts which are in the schedule of Cap. 88 are incorporated into Hong Kong law because the local legislature has so chosen. In fact, most Hong Kong Ordinances are practically copies of the corresponding Acts of Parliament anyway, so the difference between an Act reproduced as an Ordinance and an Act listed in the Schedule is negligible. Besides, it may have been too time-consuming to enact a separate Ordinance for each scheduled Act. Therefore, as long as section 4 of the AOELO is amended in such a way as to be consistent with the Basic Law, the AOELO could still be maintained after 1997.

[18] Britain once maintained that "consultation" meant merely keeping the Chinese side informed, and it retained the final say on all matters since the Joint Declaration stipulates that the administration of Hong Kong before 1997 remains solely the responsibility of the British government.

[19] At present, there are about 300 pieces of imperial Acts applying in Hong Kong. A Localization and Adaptation of Laws Unit has been set up in the Legal Department to review these Acts. Thus far, the progress of converting and re-enacting these laws into Hong Kong statutes is very slow. It was revealed (by an officer of the Legal Department) that: 35 pieces have been re-enacted; 90 pieces have been deemed to be outdated and should be repealed; 75 pieces have been discussed in the JLG but no decision has been reached yet; 50 pieces have been prepared for discussion in the JLG and about 50 pieces are still under study but a large proportion of them may be repealed.

> The slow progress is partly because of the complexity of some of these legislation (particularly in admiralty law), partly because some of these Acts are related to international treaties to which the PRC is not a party, partly because the Chinese authorities [have] been slow in responding to some of the proposed amendments tabled at the Joint Liaison Group, and partly because the British side of the Joint Liaison Group has failed to identify the priority of localization among this group of legislation.

Considering this bleak situation, Governor Patten made the following pledge in his second policy speech:

> It is urgent that we prepare for the change of sovereignty in 1997 by pushing ahead with adapting and localising our laws to bring them into line with the provisions of the Basic Law. . . . We will need to introduce into this Council a large number of bills in the next three years to localise our legislation. . . . There is a great deal to be done, and not much time to do it, if we are to ensure that we have a complete set of laws capable of continuing beyond 1997. If progress in the JLG does not speed up significantly, there is a high risk that the work will not be finished before 1997, and we will then face a legal vacuum. It would be irresponsible for us to let that happen, and I am determined that we should do everything possible to keep to our target for this extremely important exercise.

B. Continuous Application of Common Law Previously in Force in Hong Kong

"The common law previously in force" can be interpreted as the common law of England[20] that exists on 30 June 1997. But it may be interpreted as meaning prior to 4 April 1990 when the Basic Law was adopted.[21] Of course, one may also assert that the proper cut-off date should be 27 May 1985, the day when ratifications of the Sino-British Joint Declaration were exchanged in Beijing. The repercussion of the 1985 or 1990 interpretations is to present the HKSAR with a set of out-dated laws. A much more reasonable date is therefore 30 June 1997, a day before the Basic Law is put into effect.[22]

Section 3 of the AOELO, however, does not entirely converge with the Basic Law. Some amendments should be made. It could be modified as follows:

> (1) The common law and the rules of equity as existed on 30 June 1997 shall be in force in the Hong Kong Special Administrative Region--
> (a) so far as they are not in contravention of the Basic Law;
> (b) subject to its applicability to the circumstances of the Hong Kong Special Administrative Region;

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20 Section 3, Interpretation and General Clauses Ordinance, Cap. 1, LHK.

21 That interpretation was made by "patriotic" publicists in the context of the Hong Kong Bill of Rights Ordinance, Cap. 383, LHK. See Peter Wesley Smith, "The Common Law of England in the Special Administrative Region" in Raymond Wacks (ed), *Hong Kong, China and 1997 Essays in Legal Theory* (Hong Kong: HK University Press, 1993), p. 27.

22 Ibid.

(c) subject to such modifications as such circumstances may require;

(d) subject to any amendment thereof (whenever made) by any Ordinance.

(2) The common law and the rules of equity shall be in force in Hong Kong as provided in subsection (1) notwithstanding any amendment thereof as part of the law of England made at any time by an Order in Council or Act.

Literally, the above amendment can comply with the words of the mini-constitution. However, the aim of discontinuing the application of imperial legislation may not be achieved. That can be explained in two ways.

1. Pre-1843 Unscheduled Acts of Parliament (with the effect of abrogating and restricting the application of common law rules)

Assuming that the *Oceania* case is correctly decided, the decision indicates that the continuous use of common law would invariably accompany the continuous application of these imperial Acts in the HKSAR indirectly. These imperial Acts may not be in force, but they would continue taking effect through their interaction with the common law because no abrogated or restricted law of England can be revived. Of course, this scenario can be changed by adding an additional provision in the AOELO that s 23(a) of the IGCO does not apply in this context. But the effect of such a move is that many areas of modern Hong Kong law would suddenly be replaced by common law rules which are perhaps centuries old. Should the SCNPC declare that these old common law rules are not applicable to the HKSAR, a legal vacuum would be created.

2. Currently Applicable Imperial Acts

The *Oceania* solution can also shed some light on the potential complications caused by the repeal of all imperial statutes (whether made before or after 5 April 1843) by the Basic Law after the change of sovereignty.[23] By analogy, one can argue that where Article 8 of the Basic Law repeals all imperial Acts previously in force in Hong Kong, the repeal shall not revive anything which is not in force or existing at the time when the repeal takes effect.[24] Imperial Acts, which abrogate or restrict common law and are in force on 30 June 1997, would still have an indirect application in the HKSAR, even though they have not been incorporated into Hong Kong laws through local legislation. They may not be in force in a technical sense, but they would masquerade and take effect through their interaction with the

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[23] This argument was raised by Johannes Chan in a private conversation with the author.

[24] Technically speaking, the Basic Law will not repeal these imperial Acts. Rather, the SCNPC may declare them as in contravention of the Basic Law, such that they cannot be adopted as part of the law of the HKSAR (Article 160). The problem arises as whether "not adopt" is equivalent to "repeal". If not, s 23(a) cannot be applied and the whole argument would be invalid. Section 3 of the IGCO defines "repeal" as including "rescind, revoke, cancel or replace." But the term "adopt" does not appear in the IGCO. Purposely, there is no reasons why "not adopt" cannot be interpreted as "repeal".

common law.[25] In this manner, whether they are localised into Hong Kong statutes becomes insignificant. For example, suppose that there is an Act of Parliament "X" which abolished an old common law rule "Y" applying in the territory. However, that Act is not localised into the statute book of Hong Kong before 1 July 1997. Hence, it would cease to take effect after the switch of sovereignty. But the repeal of an Ordinance cannot revive anything which is not in force at the time of repeal, so the old common law rule Y cannot be revived. The rule X would continue to take effect by means of common law. All the painstaking efforts to discontinue the application of imperial legislation would be in vain. Meanwhile, the situation would become terribly complicated as one has to examine the effect of each Act of Parliament on the common law. Certainly, one could argue that the principle in s 23(a) of IGCO could not apply here since it would not be a case of an Ordinance repealing another Ordinance, but rather a constitution repealing statutory laws. If that argument is followed, then many old common law rules that have never been in force in the territory would be revived and legal confusion would become inevitable. As mentioned above, the Chinese Government could say that these old common laws are also not applicable to the HKSAR and a legal vacuum would be created.

The above discussion unveils that even if the pre-1843 unscheduled and the currently applicable Acts are not incorporated into local laws prior to the change of sovereignty, they may still have effect in the HKSAR. However, as the indirect reception of imperial Acts may usher in a period of legal confusion, the best and easiest way to eliminate it is to hasten the pace of incorporating all the relevant imperial Acts into the territory through local legislation before 1 July 1997.

C. Common Law Not Previously in Force in Hong Kong

How about those common law rules which appear to be not previously in force in Hong Kong because they have no counterpart before the date of transfer of sovereignty? Or in other words, are developments in the common law occurring after 1997 capable of being part of the law of the SAR under Article 18 of the Basic Law?

According to the declaratory theory, the common law consists of a body of long-established principles which could be found in the customs of the people. They are law simply because they are long established. The law is always there. There is always a correct answer to any legal inquiry. The role of judges is to discover and declare the true law, but

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[25] Based on this argument, an inference can be drawn about the destiny of the Bill of Rights (BOR) after the change of sovereignty. The Chinese Government has repeatedly denounced the BOR as incompatible with the Basic Law and threatened to repeal it after 1997. In reliance on s 23(a) of the IGCO, one may argue that when the Basic Law repeals the BOR, the repeal cannot revive anything which is not in force or existing at the time the repeal takes effect. Though the BOR may not be in force in a technical sense, it would continue taking effect through its interaction with the common law. For example, in *Sin Yau-ming* (1991) 1 HKPLR 88, the Court of Appeal struck down a few statutory presumptions in the Dangerous Drugs Ordinance because they had the effect of placing the burden of proof on the defendant, which was inconsistent with Article 11(1) of the BOR. Suppose that the BOR is repealed by the Basic Law: the repeal could not revive the invalidated presumptions in the Dangerous Drugs Ordinance since they are not in force or existing when the repeal takes place. The *Sin Yau-ming's* decision would therefore continue to be applied, and Article 11(1) of the BOR is actually taking an indirect effect. In short, the BOR may still be retained in some form or another even if it is repealed by the Basic Law.

not make it.[26] Hence, "judicial decisions do not necessarily represent the law, though they are cogent evidence of it, and when a court changes its mind it appears to correct a previously unrecognized distortion of the true, unvarying law."[27] To avoid confusion, one must distinguish between "principle" and "rule" and between "change" and "development". "A specific rule is simply an illustration and detailed application of a broad, background principle. As more rules are enunciated the true principle emerges a little more clearly but it does not change: rather, more of it is revealed by an incremental development."[28]

If this theory does hold water, the cut-off date, 30 June 1997, will be meaningless. Common law before the cut-off date is the same as that after the cut-off date. There is no need to examine whether common law has been previously in force. They are actually the same, despite the fact that they appear to be different.

But if one is a follower of the positivist theory, the above analysis is utterly wrong. "Development means change. Judges, when developing the law, change it, create it, make it; the common law is judge-made law and therefore identical to what the judges say it is."[29] "When a court overrules an established decision it changes a law; when it settles a novel point of law it creates new law . . . . English law is what the House of Lords says it is from time to time."[30] It follows that a distinction must be made between the common law that is previously in force and that which is not previously in force. The cut-off date becomes relevant. A House of Lords decision announced after the cut-off date which is different from one prior to the cut-off date would not be incorporated into the HKSAR simply because the rule is not in force in Hong Kong on 30 June 1997. At most, the decision could be referred to, but it would not be binding.[31]

Based on these two contradictory theories, one can "select the one when it suit[s] their purpose and the other to avoid the logical consequence."[32]

D. Implications of Articles 158 and 160 of the Basic Law

The above discussion is based upon an optimistic, though unrealistic, assumption that the Chinese Government would not adopt a meddlesome attitude towards the internal affairs of the HKSAR. In fact, the two-stage device in the Basic Law will enable the SCNPC to retain the final say on what common law will be applied.

First, Article 160 provides that "upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law." Clearly, the SCNPC retains the power to determine what law previously in force is in contravention of the Basic Law. "This

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[26] Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (Hong Kong, Oxford University Press, 2nd ed, 1993), pp. 65-7. For details, see Peter Wesley-Smith, "Theories of Adjudication and the Status of Stare Decisis" in Goldstein (ed), *Precedent in Law* (New York: Oxford University Press, 1987), p. 73.

[27] Peter Wesley-Smith, see note 21 above, p. 17.

[28] Peter Wesley-Smith, see note 26 above, p. 66.

[29] Ibid.

[30] Peter Wesley-Smith, see note 21 above, p. 18.

[31] Article 84 of the Basic Law stipulates that "the courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this law and may refer to precedents of other common law jurisdictions."

[32] Peter Wesley-Smith, see note 21 above, p. 18.

endows the Standing Committee with the power to determine what the common law actually is . . . ."[33] For instance, the SCNPC can declare that the *Oceania* decision is contrary to the spirit of Basic Law in that it is not the intention of the Basic Law to preserve the application of imperial Acts after 1997. *Ergo*, the fate of common law will depend very much on the prevalent policy adopted by the Chinese Government towards the HKSAR.

Second, even if a common law rule has been adopted in accordance with Article 160, it can still be rendered ineffective subsequently. Remember the power of final interpretation of the Basic Law is vested in the SCNPC, notwithstanding that the courts of the HKSAR shall be authorized to interpret the provisions which are within the limits of the Region's autonomy. The SCNPC can make an interpretation that a common law rule contravenes the Basic Law (the courts of the HKSAR have to follow such an interpretation), provided always that the situation falls within the parameters of paragraph 3 of Article 158 of the Basic Law:

> [I]f the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. . . .

That is to say, the SCNPC can give an authoritative interpretation of what common law is if these three conditions co-exist: (1) affairs relating to the responsibility of the Central People's Government or the relationship between the Central Authorities and the HKSAR; (2) the interpretation will affect the judgments on the cases; (3) the judgment is not appealable. Arguably, almost all provisions in the Basic Law can be considered as falling within the ambit of the first condition. In addition, it is quite difficult to find a situation where the litigant would challenge a particular provision which is not relevant to the outcome of his case. Thus, conditions (1) and (3) will exist in most cases. Therefore, whether courts of the HKSAR have to seek interpretation from the SCNPC depends largely on the jurisdiction of the court hearing the case.

IV. Conclusion

Although the matters discussed herein are extremely technical and academic, their significance should not be underestimated. First, the 1971 amendment results in the application of out-dated common law. Second, the *Oceania* decision indicates that pre-1843 unscheduled imperial Acts do, and will, have effect. Third, the continuous use of common law after 1997 will accompany the indirect reception of imperial Acts which are intended to be disapplied. Fourth, the two-stage device entrenched in the Basic Law will enable the powers that be in Beijing to clutch the interpretation of common law.

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[33] Raymond Wacks, "The Judicial Function" in Raymond Wacks (ed), *The Future of The Law in Hong Kong* (Hong Kong, Oxford University Press, 1989), p. 134.

A Few Words About "Introduction To Legal Theory"

Eric Yung*

It is easy to get a pass in "Introduction to Legal Theory". With a bit of luck, it would not be difficult to get a relatively decent grade if one applies the usual skills that brought him into the university. Accordingly, what is worthy of attention is how to benefit intellectually from the course. Not intended to be a course evaluation or an advice on examination technique, this paper is written with the objective of facilitating the study of "Introduction to Legal Theory". Developed from the author's experience last year,[1] it will deal with the basic structure of the course, some difficulties of learning and how they can be coped with. Needless to say, the reader should consider this paper critically and make all necessary adjustments for individual idiosyncrasies even if he or she goes along with what will be unfolded in the following lines. It is hoped that a better study of the third-year course, which is the sole course in the LL.B curriculum that demands an unrestricted reflection on the law, would promote this important calling among students.

Assume the main characteristics of the course remains unchanged from those of last year. "Introduction to Legal Theory" differs from the other law courses in a significant way--it is essentially an argument ("the Argument"[2]). Thus, there is a central thought running through the entire course. The lectures start off with background information which, apart from setting the tone for further debates, provides the justification for learning theories. They are about the debate on the proper contents of legal education (jurisprudence or legal theories), theories of theory and practice and history of English and American legal education. Those are followed by a brief analysis on (mental) "blindness", which is a habit of our being ignorant of the effect of theories on our jurisprudential judgment. Next in line are some inputs from linguistics and psychology. They are brought in to develop the proposition that language, as the vehicle of legal concepts, is unstable. This proposition is itself a building block to a further proposition that a corresponding change of our understanding of legal concepts according to a change of circumstances is thus possible.

The second half of the materials is the application of the first half on what is regarded as the central theme of the law: notions of rights. Both positive rights and negative rights that are observed in different political regimes are considered. The conclusion of the course is culminated from the propositions developed since its beginning. According to the author's understanding, reconstruction of the notion of rights in local society is possible and necessary because of both the imminent transition and the fact that Hong Kong is a blend of two diverse cultures neither one of which entirely suits the interests of people of Hong Kong.

Because the course is developed along the structure of an Argument, the reading materials and contents of lectures are selected in such a way as to facilitate the elucidation of the Argument. Though there is a wide variety of reading materials, only the relevant discussions are highlighted in lectures. In any event, it is impossible to cover all the views and ideas articulated by any single jurist under the time constraint of the one-unit course. A lot of issues that are raised by the materials but are irrelevant to the Argument have to be left out.

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1 This paper is based on the author's experience in the legal theory class of 1993.

2 It is not the intention of the author to elaborate his interpretation of the "Argument"; because it is neither relevant to the discussion here nor beneficial to the study of the subject.

Such selective coverage of the materials has several consequences. If the major theme of a jurist's article does not relate to the Argument, the former would only be touched on briefly. Even if it is related, the emphasis of the course is placed upon the intercourse between the article and the Argument. Take the example of the articles written by Prof. H.L.A. Hart. Last year we had an excerpt from his book *Law, Liberty And Morality*. The excerpt was put in to indicate the origin of a particular line of thought on law and morality. Similarly an excerpt of Prof. Ronald Dworkin's article was included to indicate the origin of a contrary line of thought on the subject. It was the contention of the lecturer that the Justices of the U.S. Supreme Court in *Bowers v. Hardwick*[3] have assimilated the two lines of academic thought without their own awareness. The point was that people practised theory unconsciously. This is of course an integral part of the Argument. Nevertheless, apart from being examples to illustrate the point, the articles were not analysed from the other perspectives, although they are worthy of close study.

When it becomes necessary to evaluate issues other than those of the Argument (the nature of law, for example), students have to study them independently without the benefit of adequate coverage in class, or rely on whatever they can learn from the brief discussion in class to construct the whole picture. Usually the tendency is to follow the latter choice, especially when the deadlines of other commitments are coming up. Naturally students' ability to assess critically those issues would be limited by their restricted exposure.

As far as the author understands it, the gist of the Argument is to advance a post-modernist view on rights. This requires a thorough understanding of the limitations of Eastern and Western notions of rights. It is a modified, thus new approach, and it raises more questions than answers. Having focused on the Argument all along and failing to study closely other issues that can assist a general understanding of the subject, it is likely that students would have little to draw on to formulate their own arguments. Moreover, their ability to appreciate the Argument might also be negatively affected.

Another type of difficulty that students would probably find in the course comes from the contents. Very often the statements are wrapped up in words that are not in ordinary circulation. Some of them are antiquated English. However, the most difficult part is the theoretical nature of the reading materials. Generally speaking, they are abstract, thus alienated from everyday experience. Being in their early twenties, most students do not have the depth of life experience to appreciate the issues that emerge from life but make life complex. Finally, some problems arise from the application of knowledge of other academic disciplines in the subject, because most students have no previous training in them.

Time constraints will continue to be the main source of most of the aforementioned difficulties. This is something we can do little about. Fortunately it does not account for all problems, and therefore there is something on which we, as students, can work. Our object is to make fertile use of the limited time of the single-unit course. One should always be aware of where the emphasis of the course lies and the inevitable trade-off of diminished attention to other issues of law. Exposure to different issues in the right proportion is key to a balanced understanding of the subject. It is thus necessary for one to do some reading on his own in those areas where the emphasis of the course subsides. To share the additional reading load with a classmate is probably a good idea. Also, one should ask for an extended discussion on those issues when an opportunity arises in class.

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[3] (1986) 478 US 186, 92 L Ed 140, 106 S Ct 2841.

By its nature "Introduction to Legal Theory", like any other similar course under a different name, demands a justification for any human behaviour. Theoretically it requires one of the most vigorous probes into the mind. There is no reason why an aspiring student should not strive for his ideal. Whenever the class meets, students should be intellectually awake and be prepared to question any proposition that does not have an adequate substantiation. It is of course a matter of judgment how well a proposition is substantiated. The crucial tools are logic and objectivity. To attain the latter, one should resist any temptation to let emotions obscure one's judgements. Formal training in thinking or logic would of course help. At a minimum, students should have some information about the proper structure of an argument and about common logical fallacies so as to be able to evaluate each argument incisively (and construct their own).

Here are some views on good argument. An argument is formed by a conclusion and its supporting premises. The force of the latter must be strong enough to support the former and no other. If there can be a different conclusion drawn from the premises, there is no concluded statement. If there can be a better conclusion, the better conclusion should have been stated instead. As between each pair of consecutive premises, there must be no material gap. No single premise may contradict any other. If any single premise requires a substantiating premise, the latter must come before the former. Finally there must not be any single premise that is unrelated to the main idea of the argument. A logical fallacy occurs when one of the above is violated. It takes a variety of forms and thus one argument can possibly be besieged by a few fallacies. A good argument should be free of any fallacy, and its cogency largely depends on how strong the support of the premises there is. Being an intellectual process, theories of law should also be subject to the same scrutiny, though necessary accommodations need to be made for any special characteristic.

It is unnecessary to get into the nice technicalities of the structure of an argument. However, constant practice on the materials from "Introduction to Legal Theory" is a pre-condition for an understanding of the subject above pure memorization. To a certain extent it can also alleviate the problems occasioned by difficult language (by deliberately overlooking the irrelevant, the inconsistent and the repetitive points).

That brings this paper to the final point. One should always keep in mind the basic issues of the course. People's interests vary, but there are questions, be they broad or narrow, that are worthy of regular inquiry. Examples of those are abound in law books and for learning purposes one is advised to compile his own list.[4] Regular examinations of those questions would greatly assist the learning process in various ways. The major benefit would be a systematic understanding of issues, (e.g. the connection between theory and practice) the complexity of which would have defied any rational organization. If the student is in trouble notwithstanding, he should seek to approach the lecturer and tutor as he always should.

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[4] Common examples are: What is law? Is there an essence of law? If so, would it change according to the needs of society? Given the nature of law, what are outside its supervision? What is the nature of rights? What is the relationship between morality and law? Or between religion and law?

CHINESE CUSTOM THE NEW TERRITORIES: NON-INDIGENOUS WOMEN'S RIGHT TO INHERIT LAND*

JENNIFER VAN DALE**

I. *Introduction*

There was tremendous controversy in Hong Kong after the Government introduced the New Territories Land (Exemption) Bill and legislator Christine Loh Kung-wai proposed an amendment to that Bill. In this comment I discuss the Chinese custom of male-only inheritance, and specifically the impact that that custom has had on non-indigenous women. First I introduce and analyze the relevant background legislation and cases, including *Tang Kai Chung and another v. Tang Chik-shing and others*, and s 13 of the New Territories Ordinance (Cap. 97), which deals with the application of Chinese customary law. I then discuss circumstances which, in the past, have warranted the application of Chinese customary law. Finally, I discuss the debate surrounding the inheritance right of indigenous women in the New Territories.

II. *Background*

The New Territories Ordinance was intended to protect indigenous residents[1] of the New Territories and their customs, one of which is male-only inheritance. This protection is found in s 13 of the Ordinance, which reads "[i]n any proceedings in the High Court or the District Court in relation to land in the New Territories, the court shall have power to recognize and enforce any Chinese custom or customary right affecting such land."

Although the intention was to protect the customs only of indigenous residents, and not to apply those customs to other New Territories residents, the scope of s 13 was extended in the 1970 case of *Tang Kai-chung and another v. Tang Chik-shing and others*[2] to include non-indigenous residents. In that case it was held that s 13 was mandatory, in that it must always be applied. By holding that Chinese customary law should apply to all New Territories land in all cases, the learned Mills-Owen J. in fact ruled that custom should apply to non-indigenous residents. For example, a non-indigenous woman living in a flat in Clearwater Bay (which is in the New Territories but is not an "indigenous" area) would be governed by the same Chinese customs as an indigenous women living in a village in Yuen Long (which is an area where many indigenous villagers live).

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* ed. note: This comment was written before the passage of the New Territories Land (Exemption) Ordinance and its amendment. While the author has updated the essay to acknowledge the new Ordinance, the main points raised herein have been resolved by that legislation. We feel, however, that the alternative solution discussed here is an interesting point.

** B.A. (Rutgers), first year law student. I would like to thank Dr. Carol Jones for her guidance in researching this topic and for her valuable suggestions during our many conversations on it. I am grateful to Mr. George Edwards for his comments. Any mistakes are of course my sole responsibility.

1 By "indigenous" I refer to those residents of the New Territories who can claim an ancestor who was resident in 1898, when the New Territories were leased to Britain.

2 [1970] 1 HKLR 276.

Non-indigenous residents could circumvent the application of customary law by making a will or securing letters of administration. However, this was only correct until 1971. A woman who was bequeathed New Territories land in a will after 1971 did not have valid title to that land. The problem lay in the Probate and Administrative Ordinance[3] and the Intestates' Estates Ordinance,[4] which were enacted in 1971 when the Hong Kong Government made sweeping changes to many laws with regard to Chinese customary law.[5] These two Ordinances did not apply to land in the New Territories,[6] so the Probate Office post-1971 actually had no authority to deal with wills concerning New Territories land. The only legislation which provided for wills or letters of administration in the New Territories was s 17 of the New Territories Ordinance. But this section sets a very short time limit to establish the validity of a will (i.e. to probate it) -- only three months. In present day Hong Kong, there are few, if any, wills which are probated in such a short time, and although some wills are probated anyway (i.e. exceeding that time limit) it was unclear if those titles to land would be valid if challenged.[7] However, there is no longer uncertainty under the New Territories Land (Exemption) Ordinance, which specifically states that "[f]or the purposes of . . . the Probate and Administration Ordinance [and] the Intestates' Estates Ordinance, land to which Part II of the New Territories Ordinance (Cap. 97) applies . . . shall be deemed to be land exempted from that Part by the Governor under s 7(2) or (3) of that Ordinance."[8]

The New Territories Land (Exemption) Ordinance, which modified the New Territories Ordinance, divides New Territories land into two types: "urban" and "rural". Originally, only urban land was intended to be exempt from Chinese custom, which would allow non-indigenous women to inherit land. Because the New Territories Land (Exemption) Bill originally did not apply to rural land, Ms. Loh proposed an amendment which would extend the exemption to indigenous women. This amendment was the cause of much of the controversy. After public opinion came out in support of it, the Government decided to extend the exemption of Chinese custom to all land in the New Territories. In the final version, all land was exempted (see preceding paragraph) with the result that all women in the New Territories can inherit land whether or not there is a will.

Thus, whereas previously it was possible for indigenous land owners to "opt out" of s 13 (which applied Chinese custom) by making a will, the effect of the New Territories Land (Exemption) Ordinance and its amendment is that it is now necessary for land owners to "opt in" if they want to exclude women from inheriting land.

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3 Cap. 10, LHK.

4 Cap. 73, LHK.

5 For example, concubinage was abolished then, and there were changes to the law regarding customary marriage and posthumous adoption.

6 By virtue of sections 75 and 11 of Cap. 10 and Cap. 73, respectively.

7 *Addendum to Part V of the Report of the Hong Kong Council of Women on the Third Periodic Report to the United Nations by Hong Kong under Article 40 of the ICCPR*, p. 2.

8 Sections 7 and 8, New Territories Land (Exemption) Ordinance. It would be interesting to see how the courts dealt with a dispute to title dating prior to the New Territories Land (Exemption) Ordinance taking effect, and if the courts would apply this section retrospectively.

III. Section 13 -- Mandatory?

The Effect of Tang Kai-chung and another v. Tang Chik-shing and others

While this author welcomes the New Territories Land (Exemption) Ordinance and fully supports Ms. Loh's amendment, she would point out that the problem of non-indigenous women's being subject to Chinese custom could have been solved without legislation.

My argument centres around s 13 of the New Territories Ordinance and *Tang v. Tang*,[9] which deemed that section to be mandatory. It is submitted that the case can be distinguished, and therefore the application of customary law (s 13) should be permissive. If the application of s 13 is permissive, then non-indigenous women would presumably not be subject to customary law and would be able to inherit land.

The Government and courts' position on s 13 is that it is mandatory. The leading case on this point is *Tang Kai-chung and another v. Tang Chik-shing and others*, which dealt with the partition of *Tso* lands.[10] In his judgment, the learned Mills-Owen J. stated that ". . . it would then be very difficult to escape the conclusion that the provision relating to Chinese custom and customary right was likewise mandatory . . . ."[11] However, this case can be distinguished on fact for two reasons. The first is that the type of land is different, and the second is that the customs are different.[12]

By looking closely at the reasons for that decision, as well as the plain wording of the decision itself, one can infer that Mills-Owen J. intended his judgment to apply to rural lands in the New Territories only, and not to all New Territories land. The judge, in leading to his determination that s 13 is mandatory, said that:

> In a situation such as *Cap.* 97 envisages . . . one must give priority to the language of the enactment itself and the circumstances in which it was enacted. When one comes to consider the circumstances in which the New Territories Ordinance came to be enacted, including the history of the New Territories, in my view all doubts disappear. The establishment of the Land Court to ascertain and determine claims to land . . . the form of the block Crown leases expressly recognising the various forms of clan holding, including that of a Tso, and the provisions of [the Ordinance] expressly recognising such holdings . . . lead . . . irresistibly to the conclusion that the Court must recognise and enforce Chinese custom and customary right *in the case of a Tso in the New Territories.*[13] (emphasis added)

It is clear that the learned judge is referring to the family lands of indigenous residents, not to built-up urban areas.

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9 Note 2 above.

10 See Belinda Wong, "Chinese Customary Law - an Examination of the *Tsos* and family *Tongs*" (1990) 20 HKLJ 13, which discusses in detail the background to the various types of land and houses in the New Territories.

11 Ibid, p. 295.

12 Respectively, Tso and urban lands, and the customs restricting the partitioning of Tso lands and of male-only inheritance

13 See note 2 above, p. 295.

Regarding the customs in question, it is apparent that when he decided that s 13 was mandatory, Mills-Owen J. placed great emphasis on preserving the social structure of the clan.[14] By definition, partition would break up a piece of land, which is clearly destructive. But it is not apparent how, in this modern day, preserving male-only inheritance would serve to maintain the social order in the same way. To begin, in urban areas there is no "clan" or extended social structure of which to speak.

Previously, when a woman married, her property became her husband's. In that case, allowing women to inherit family land *would* have the effect of splitting up the family's lands.[15] However, today a woman's property does not belong to her husband upon marriage, and if daughters inherited on an equal basis with their brothers the family would not be "giving away" their lands.

Not all land in the New Territories is rural, or held by indigenous residents, or used for ancestral worship. Some is not even owned by Chinese. The law should make a distinction among these lands,[16] but the opposite effect occurs when s 13 is deemed mandatory. The application of Chinese custom to *all* New Territories land, even high-rise flats, or office buildings, or that owned by owned by non-Chinese, has led to chaotic results, because Chinese custom has been applied inconsistently.[17] One must come to the conclusion that the definition of "land" in the New Territories Ordinance[18] notwithstanding, s 13 can only be mandatory in the case of land held by indigenous New Territories residents.

IV. Application of Customary Law

If one accepts that s 13 is not mandatory, the next question is "when should customary law apply?" It is useful to look at case law[19] and government reports[20] to determine which factors have proved important in the application of Chinese custom.

I have already discussed Mills-Owen J.'s reasons for upholding the Chinese custom preventing the partition of *Tso* lands, such as the effect of abandoning Chinese custom on the social structure of the clan.

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14 See note 2 above, p. 321: "ordering such a partition . . . would be paving the way to the destruction of the Tso as an institution . . .. The Tso and the social structure are so inter-related that to interfere with one is to interfere with the other".

15 This seems to be the traditional reason for establishing male-only inheritance. See *Chinese Law and Custom in Hong Kong* (Hong Kong: the Government Printer, 1953); *The McDouall-Hennan Report* (Hong Kong: the Government Printer, 1965); *Chan Shun Cho v. Chak Hok Ping* (1925) 20 HKLR 1; and *Chan Yeung v. Chan Shew Shi* (1925) 20 HKLR 35.

16 Which the New Territories Land (Exemption) Ordinance, does.

17 For example, regarding non-Chinese residents, the Hong Kong Courts have held that Chinese custom cannot be applied to non-Chinese. See *In the Matter of the Estate of Kishen Das* 26 HKLR 42. Another inconsistency can be seen from the fact that the Probate Office had been handling wills which dealt with New Territories land when it actually had no authority to do so until recently.

18 Section 2 defines "land" as the actual earth within certain boundaries, as well as houses and other buildings on that land.

19 There are not many cases concerning customary law in Hong Kong, primarily because it deals with such private matters as family law, disputes in which have traditionally been settled outside the courtroom.

20 Examples are *Chinese Law and Custom in Hong Kong* and *The McDouall-Heenan Report.* See note 15 above.

A. *Local circumstances and Injustice*

A seminal case on the application of Chinese customary law is *Ho Tsz Tsun v. Ho Au Shi and others*,[21] where the court held that Chinese custom is "so much at variance with the English law of marriage and succession" that the Statute of Distributions does not govern the devolution of the leasehold estate of a Chinese intestate.[22] Here the judges held that because these differences were so great, applying English law would violate s 3 of the Supreme Court Ordinance 1873. That Ordinance provided for the reception of English law "except so far as the said laws are inapplicable to the local circumstances".

The idea of applicability to local circumstances was again raised in the case of *Wong Yu Shi and others v. Wong Ying Kuen*.[23] In that case it was held that Chinese law and custom should only take precedence if the corresponding English law is inapplicable in the sense that it could not be applied without injustice or oppression, and if the English law was not shown to be excluded by Hong Kong legislation.[24] While it would seem that the English laws of inheritance law are excluded in the New Territories by virtue of the New Territories Ordinance s 13, as decided in *Tang v. Tang*, if one accepts the arguments above that s 13 is not mandatory, then English law would not be excluded by Hong Kong legislation.

That still leaves the question of injustice or oppression. *Wong Yu Shi* is similar to the Privy Council case of *Khoo Hooi Leong v. Khoo Chong Yeok*[25] where the Chinese custom of legitimating a son by subsequent recognition was not recognised. Their Lordships held that the *only reason* for modification of English law should be to prevent injustice or oppression.

In the matter of male-only succession to New Territories land, one could argue that such an injustice occurs because of the three month "window" in which a will must be probated or letters of administration granted (and the fact that most wills, if not all, will not be dealt with in so short a time). Ironically, one could argue that it is unjust to indigenous *men* who have gone to the trouble of making out a will according to English law and making their wishes known, (in short doing all that they can to exempt themselves from the application of Chinese custom) only to have those wishes frustrated.[26]

There are several more cases in which Chinese custom was not applied, or was applied in a modified way. Among the reasons given in these cases are putting the best interests of the child before custom[27] and the fact that English law had already been applied for many years without chaotic results.[28] In sum, judges have considered several factors when determining the applicability of Chinese custom. Among them are current practice, the best interests of children, and the appropriateness of English law. "Appropriateness" has come to mean whether applying English law would cause oppression or injustice.

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21 (1915) 10 HKLR 69.

22 Ibid, p. 80.

23 [1957] HKLR 420.

24 Ibid, p. 443.

25 [1930] AC 346. Although this case did not originate in Hong Kong, it involved Chinese customary law in a British colony.

26 By the inclusion of all New Territory lands, not just indigenous residents' land, from Cap. 10 and Cap. 73. This observation was first made by Dr. Carol Jones.

27 *Chan Leung Ngan-ho v. Chan Lin Yau*, case note in (1975) 5 HKLJ 347

28 *Chan Shun Cho v. Chak Hok Ping* (1925) 20 HKLR 1.

B. Chinese Custom in 1843

By looking at government reports, particularly in the area of customary marriage, one can see other factors, aside from appropriateness of English law, which the Hong Kong Government contemplated when considering the applicability of Chinese customary law.[29]

One such factor was the difficulty and expense of discovering what the relevant custom was in 1843. It was recommended that a statutory definition of custom be introduced based on what the prevailing custom was at the material time.[30]

It is worth noting that there has been some academic discussion of the use of 1843 as the date determining Chinese custom. The case of *E.R. Belilios v. Ng Li Shi*[31] was the first to use this date, and that decision was affirmed in *Ho Tsz Tsun v. Ho Au Shi and Others*.[32] The judges based their decisions in part on the Supreme Court Ordinance 1873, which provided for the reception of English law in Hong Kong "except so far as the said laws are inapplicable to the local circumstances". E.S. Hayden, however, makes a very good point in that if the intention was to "freeze" custom at 1843, then the Ordinance should have read "except so far as the said laws *were* inapplicable".[33] (emphasis in original)

Furthermore, there is evidence that the Hong Kong Government decided to recognise Chinese custom which had developed after 1843. After the Nationalist Government took over in China, they enacted a Civil Code which displaced the old, more cumbersome form of customary marriage. In Hong Kong, one government report states that:

> [T]his new kind of marriage, dissolution of which could normally be effected by mutual consent, became increasingly popular in Hong Kong, and from 1930 until now [1965] the Government has in practice treated these Modern Marriages as if they were as valid as those contracted in accordance with Custom. . . . Until 1960, and very possibly since then, at least half of all the marriages celebrated in Hong Kong have been in this form.[34]

So it would seem that as well as the practicality of determining custom, the current favour of that custom amongst the local residents was also a factor which the Government considered.

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29 Customs of 1843, not the present day, are considered. As Dr. Carol Jones has pointed out, the effect of "freezing" custom at this point has been to create a sort of "precedent". While this is a characteristic of the common law, it is not appropriate for customary law, which should be variable. See "The New Territories Inheritance Laws: Colonization and the Elites", in V. Pearson and R. Leung *Women in Hong Kong* (Hong Kong: Oxford University Press, forthcoming).

30 *The McDouall-Heenan Report*, note 15 above, p. 8.

31 *Hong Kong Daily Press*, January 26, 1893.

32 above note 21.

33 E.S. Hayden, "The Choice of Chinese Customary Law in Hong Kong" (1962) 11 ICLQ 231, pp. 249-250. The Supreme Court Ordinance 1873 was the third Ordinance to use that phrase. When one realises that it was enacted almost thirty years after the first Ordinance to do so, it becomes apparent that the legislature had ample opportunity to clarify any "cut-off" date for the recognition of Chinese custom.

34 *The McDouall-Heenan Report*, note 15 above, pp. 15-16.

C. *Previous Consultation*

The Hong Kong Government has a history of consulting the public as well as taking other factors into consideration when considering the application of customary law. Some examples include the law regarding concubines,[35] adoption,[36] and succession.[37] But with regard to intestate succession to land in the New Territories, until 1993 only public opinion was considered, and that "public" consisted of elderly men[38] and "of course no women"[39]

In sum, the Hong Kong Government has taken many factors[40] into account when looking at other Chinese customs and deciding if they should be permitted to the exclusion of English law, but until 1993 it stopped at semi-public consultation on the customs relating to intestate succession.

The Government places great weight on the opinions of New Territories advisory groups such as the Heung Yee Kuk, which has a seat in the Legislative Council. If the Government still gauges "public" opinion in the New Territories by male-dominated groups, it is not getting an accurate picture. Furthermore, if such advisory groups exclude women, they may be in violation of Article 21 of the Bill of Rights, which guarantees to all people the right to participate in public life, and Article 1 which says that Hong Kong citizens are entitled to those rights in the Bill of Rights regardless, *inter alia*, of sex.[41] Because the Government continues to assess public opinion through such groups, it is most important that the groups be constituted fairly and represent the entire community.

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35 Public opinion, the doctrine of equality between the sexes, and the law in China were taken into consideration. See *Chinese Law and Custom in Hong Kong*, ibid, pp. 41-2.

36 Permitting non-Chinese to effect adoption, allowing the adoption of girls, providing for those Chinese who wish to be governed by English other than customary law, and providing for adoptions not valid under customary law were considered. Ibid, p. 50.

37 The law in England, China and Europe, public opinion, and practice in China were all considered relevant. Ibid, pp. 53-58.

38 Ibid, p. 34.

39 ibid, p. 61. While the Government did consult some women's groups about the New Territories Land (Exemption) Ordinance, their previous practice had been to consult with the New Territories village leaders and similar advisors, all of whom were men.

40 These include public opinion, established practice, and the doctrine of equality between the sexes. If one considers case law as well, factors such as preservation of the social structure and the appropriateness of English law have been considered important.

41 There are unanswered questions regarding the Bill of Rights (BOR) and s 13. Article 22 guarantees the right to equality before the law of all persons. However, there are two problems which may be encountered when invoking the BOR. The first is that Hong Kong courts have held that the BOR cannot apply in cases between private citizens to impugn legislation affecting the rights of those parties *inter se* (*Tam Hing Yee v. Wu Tai Wai* (1991) 1 HKPLR 261). Therefore a woman who sued her brothers or other relatives for her rightful share of family lands could not successfully invoke the BOR. The second is that male-only inheritance is not a law, it is a custom. It is unclear if one could sue the Hong Kong Government since it is not their law which is discriminatory, it is the Chinese custom. One could presumably sue to have male-only inheritance removed from what is considered applicable Chinese custom. The Government has previously modified Chinese custom (with regard to Chinese customary marriages, divorce and adoption, for example) and a good case could be made for the modification of this custom.

Moreover, one wonders why the Government consulted groups which are openly hostile to women[42] and which have conducted a campaign of misinformation on this issue.[43] The men of the New Territories had much to lose if women were allowed to inherit land on an equal basis, and it was more than their traditional way of life. Women have been kicked off their land[44] so that their male relatives can reap huge returns by selling it for redevelopment or for storing containers.[45] Land in Hong Kong is a very valuable commodity, and the men of the New Territories stand to make a hefty profit if they can take over family property from their female relatives.[46]

V. Conclusion

When considering the New Territories, one cannot ignore the differences between modern urban areas and rural lands held by indigenous residents. None of the factors represented in case law and Government policy apply to urban lands: there is no clan structure; not all residents are of Chinese descent; women have been inheriting land without breaking up families for some time now; and it is hard to reconcile male-only inheritance with the doctrine of equality of the sexes found in the Bill of Rights. The New Territories Ordinance was enacted to preserve indigenous, rural custom. Applying it to an urban, modern area goes against the intentions of the Ordinance and sensible Government policy. By deeming s 13 to be permissive rather than mandatory, the application of customary law in inappropriate circumstances can be avoided.

Deeming s 13 to be permissive, however, would not help the indigenous women of the New Territories who would still be ruled by outdated custom. Under the original New Territories Land (Exemption) Bill, the amendment was necessary to allow these women to inherit land, and the Government should have supported it immediately. The Hong Kong Government has a long history of consulting public opinion, and it has a responsibility to

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42 There were huge protests organised by indigenous men's groups, the largest of which took place on Mother's Day 1994. Ms. Christine Loh (who proposed the amendment granting indigenous women some inheritance rights) was threatened with rape, and she and other supporters of inheritance rights for indigenous women were burned in effigy. See *South China Morning Post*, "Villagers in land rights protest" 22/3/94; "Inheritance protest ends in violence" 23/3/94; "Up to 400 police to protect legislators on rural visit" 25/3/94; and "The landed classes cling to privilege" 29/3/94. The Government should have put equal emphasis on consultation with women's groups such as the Hong Kong Council of Women or the Association for the Advancement of Feminism.

43 On the evening news, many of those who said that they did not support the original amendment to the New Territories Land (Exemption) Ordinance (which allowed indigenous women to inherit land) admitted that they did not actually know what the amendment involved, but had vague ideas that it would take away other, completely unrelated, customary rights. Since many of the protestors were bussed in from the New Territories by these same "consultation" groups, one can reasonably infer that those same groups were giving them this "information".

44 One case which highlighted the problem for many Hong Kong residents involved Tang Mui, a woman whose mother died intestate. Mrs. Tang was an only child, and although she had contributed to the purchase of the land and the house, when her mother died, three male cousins claimed that the land belonged to them, in accordance with Chinese custom. (Her mother was allowed to hold the title to the land because her father transferred it to her shortly before his death). See "Sex bias land rule challenged", *South China Morning Post*, 25/2/93

45 See "Sons of the soil greet millennium with Manchu values" *South China Morning Post*, 12/4/49

46 See "The Landed Classes Cling to Privilege", *South China Morning Post*, 29/3/94.

ensure that the public is well informed. By allowing male-dominated groups to control public debate and put forth incorrect information, the Government indirectly endorsed those groups' views. The Government should have undertaken an educational campaign to inform those residents who would be affected of the implications of the proposed amendment, including what inheritance rights men would retain and how other Chinese customs would be (un)affected.

After 1971[47] and prior to the New Territories Land (Exemption) Ordinance 1994, no women could inherit land in the New Territories. By deeming s 13 of the New Territories Ordinance to be permissive, at least non-indigenous women would have been able to inherit land. However, this is an incomplete solution. The more comprehensive legislative solution is better: there is no longer any doubt that non-indigenous women can automatically inherit land, and that indigenous women have the opportunity as well. Coming less than ten years away from the twenty-first century, one can only say "it's about time".

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[47] 1971 is the year that New Territories land was excluded from the provisions contained in the Probate and Administrative Ordinance.

"JUSTICE BEING DONE AND BEING SEEN TO BE DONE" --- THE EXPERIENCE OF MAGISTRATES' COURTS

BIBY CHAN FUNG-KUEN*

The Magistrates' Court is the threshold of our court system. Though bearing no jurisdiction over civil matters, it deals with all summary offences and some indictable offences triable summarily. It handles committal proceedings for cases transferred to the High Court. Every year, the ten Magistrates' Courts[1] deal with over half a million cases,[2] ranging from traffic offences, illegal hawking, and drug trafficking to complex commercial crimes. Many people's knowledge of the judicial structure starts with their contact with the Magistracy either by personal involvement in various cases or through the experience of relatives or friends. To an ordinary citizen, the Magistrates' Court is the reflection of the efficiency, integrity and accountability of our judiciary. To ensure public confidence, it is imperative to see that the ideal of "justice being done and being seen to be done"[3] is achieved there.

This legal ideal comprises two aspects of the administration of justice, what is done and what may appear to be done, in the eyes of the public. For justice to be done, there must be a fair trial which consists of a prompt trial by due process of law, the right of legal representation, the presumption of innocence, a full understanding of the trial process by the accused, the right to self defence, and if convicted, a sentence appropriate to the charge. For justice to be seen to be done, there should not be anything throughout the trial that may suggest the slightest possibility of interference with or failure in the administration of justice, be it an irregularity in the procedure or administrative convenience that may have overridden the course of justice. In a wider sense, justice should be administered and overseen under public surveillance so that any imminent interferences will be immediately observed.

To start, the Magistrates' Courts are definitely not successful in ensuring a prompt trial. By the government statistics in 1991,[4] the average waiting time for cases to be heard in the Magistracies was 52 days. It is highly unfair for a person, particularly if he is in custody, to wait for nearly two months before he is brought to the court for first hearing. Compared with other courts,[5] the waiting time in the Magistracies is the shortest. But, justice is measured by an absolute, not relative, scale. Justice delayed is always justice denied.

Despite the problem of waiting time, due process of law is observed. Under the paramount principle of presumption of innocence, the burden of proof lies on the prosecution. The accused in financial need is legally represented under the Duty Lawyer Scheme.[6] Before

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1 Two on Hong Kong Island, four in Kowloon and four in the New Territories.

2 In 1992, 533,754 cases were heard in the Magistracies. See the *Hong Kong Judiciary Report 1992*, p. 56 (table 3) prepared by the Registrar of the Supreme Court.

3 This legal maxim comes from the case *Rex v. Sussex Justices* [1924] 1 KB 256. The exact quotation is "justice should not only be done, but should manifestly and undoubtedly be seen to be done".

4 See "Serious Delay in the Process due to Inadequate Judicial Manpower: Cases Expected to be Dropped for Violating Human Rights", *Hong Kong Economic Journal*, 16 January 1992. (In Chinese)

5 The waiting time for criminal and civil cases is 165 and 198 days in the District Court, 218 and 256 in the High Court and 90 and 87 in the Court of Appeal. Data come from the government statistics. See note 2 above.

6 The original scheme, which began in 1979, was administered by the Law Society of Hong Kong working closely with the Hong Kong Bar Association. See *Report by the Management and Administration committee of the Law Society Legal Advice and Assistance Scheme 1979-81.*

the passage of the Bill of Rights Ordinance in June 1991, no legal aid was provided to the accused in Magistrates' Courts, and the Duty Lawyer Scheme (which is different from the Government's legal aid) only covered nine scheduled offences. In the wake of the promulgation of the Ordinance, the right to legal representation was upheld by extending the Scheme to cover nearly all offences. Furthermore, interpreters are present to serve as a bridge between the Magistrate and the accused, the two of whom may speak different languages or dialects. Sentences are given after consideration of various factors such as the accused's family background, financial condition, criminal record, a report from the social worker, etc. Justice is dispensed with, not on a mechanical basis, but according to the merits of the case. Last but not least, appeal to the High Court is allowed. Thus, the skeleton of a fair trial is present and it can be said that justice is done. However, deficiencies in the daily practices of the courts do make it obvious that justice is not always seen to be done.

Open trial is the best mechanism to ensure that justice is done and seen to be done. The justice system is not only an arena for settling individual disputes or instituting prosecution by the government, but also, it is the mechanism to ensure that citizens' rights are safeguarded by an independent judiciary which is free from interference by the administration and is accountable to the public directly. The system belongs to the public and the public should thus have free access to the courts. A free press should be allowed to publicize the process and judgment of trials so as to widen the scope of public surveillance. Accordingly, all cases in the Magistracy are conducted in open trials. However, public scrutiny is crippled by the lack of published official reports on Magistrates' cases. In practice, the Magistrate makes his own notes of all statements and pieces of evidence presented in trials, while detailed reports on judgments are not made available to any parties unless upon appeal. To the public, who may or may not be physically present in the trial, it is not known how the Magistrate perceives the facts presented and on what legal rationale the judgment relies.

The lack of official reports is mainly due to the problem of heavy caseload. *Stare decisis* dictates that the Magistracy need not be bound by its own decisions. Thus, official reports are not indispensable and the Magistrate is given great flexibility in deciding a case. But, there are always two sides of a coin. Flexibility allows fuller consideration of various factors before sentencing. It also gives rise to inconsistency in judgments of similar cases. Thus, it is not uncommon to find various complaints against the Magistrates of abuse of discretion, leniency in sentencing or excessive hardship in cases of a similar nature.[7]

A fair trial calls for the assurance that the trial is conducted in the language understood by the accused. Currently, only 21 of the 65 Magistrates may be able to speak Chinese.[8] Since counsels are also used to thinking and presenting arguments in English, the alternative of having the case run in Cantonese is seldom chosen. To the accused and the mass majority of the public, an interpreter is vital as the medium to enhance their understanding of the whole process of the trial. True as it is that interpretation services are provided, they are far from satisfactory. First, the interpreter often edits the accused and witnesses' statements to save time. What the Magistrate, especially a non-local, perceives is

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7 "Respect for law will be lessened, not increased, if hawkers and others have reason to believe that their punishment depends less upon what they have done than in whose court they appear." (1972) 2 HKLJ 254, pp. 254-256. The comments on the magisterial ineptitude in that article are still applicable today.

8 The figure is quoted from the *Hong Kong Judiciary Report 1992*, note 2 above. I say "may be able to speak Chinese" because those who have a Chinese name may not be able to speak Chinese or to conduct the trial in Chinese.

very often the interpreter's judgement of what should or should not be told. Second, the dialogue between the Magistrate and the counsel are often not interpreted at all, leaving the rest in the courtroom, particulary the accused, puzzled at what is actually going on. Third, the interpreters frequently resort to those legal jargons which are totally alien to ordinary citizens. Even if justice is actually dispensed with eventually, the public is still dubious of whether the accused's rights are fully respected and duly exercised.

Heavy caseload in the Magistrates' Courts is always a great problem. In the past ten years, the number of cases heard has been gradually decreasing.[9] But, manpower is still insufficient to cope with the workload. By simple calculation,[10] each Magistrate has to deal with at least 24.8 cases every day but the average daily working time of a Magistrate in court is only around 4 hours.[11] Heavy caseload either prolongs the waiting time for first hearing and subsequent trial or makes it administratively unworkable to have full case reports published for public scrutiny. It pushes all hearings in such a haste that the effectiveness of an interpreter is substantially reduced. Pleading, examination of witnesses and sentencing attract no more than a couple of minutes from the Magistrate. Only the regulars of courts, like the interpreters, court staff and counsel can survive and follow the procedure. Those new to the courts, especially the accused, who is fortunate enough to be there only once in a life time, may feel greatly uncomfortable and helpless since legal jargons are not fully explained, submissions by counsel not interpreted and even sentences, given in legal jargons, are not easily understood.[12] If justice is done, certainly it is not done in a way that the accused and all other observers may feel at ease.

"Justice being done and justice being seen to be done" is an ideal which pursues justice in a wider sense. Not only must the substance of law be fair, but justice must be dispensed with in such an impartial manner that is free from the slightest doubt and criticism. To measure the achievement of the Magistrates' Courts in this context, it is not unfair to come to the conclusion that justice may be done, or is done, but justice is definitely not manifestly seen to be done. Under the pressure of heavy caseload and the shortage of manpower, the Magistrates' Courts tend to yield to administrative convenience which apparently overrides the course of justice that we ardently pursue. But the price we have to pay is too high to be ignored.

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9 In 1983, 986,839 cases were heard whereas in 1992, the number reduced to 533,754. See note 2 above.

10 Divide the number of cases in 1992, i.e. 533,754, by the number of working days, i.e. roughly 287, and then by the total number of Magistrates, i.e. about 76 (taking into account those who were leaving in that year) including 65 permanent Magistrates and 11 special Magistrates.

11 The Legal Department has not officially released any figure on the average sitting time of judges and magistrates in court. But Sir Yang Ti Liang, the Chief Justice, quoted a figure from the Department that the average daily working time of a Magistrate in court in 1993 was 4 hours and 12 minutes. See *Ming Pao*, 23 March 1994. It is believed that there had not been any significant improvement over 1992.

12 In the hearing of the case *R v. Chan Cham Luen and Ki Kun Lin*, heard on 27 September 1993 in Court No.1 of the Western Magistracy, the author observed that the first defendant was scared to tears when she heard of the sentence of suspended imprisonment. Her uncalled-for fear stemmed from her ignorance of the legal difference between a suspended and an immediate imprisonment, and the haste with which the interpreter gave her explanation.

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Printed by Oceania Typesetters & Communications Ltd Tel 832 2021 (8